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MANORIAL JURISDICTION.

PROFESSOR MAITLAND'S introduction to the new volume of the Selden Society's publications[1] throws a flood of light upon the history of that peculiar institution which is now known to English law as a manor. It seems indeed that we may have to discard a good many notions which we were taught to consider fundamental.

Lord Coke, speaking of the court baron (Co. Lit. 58 a), says: 'And it is to be understood that this court is of two natures. The first is by the common law, and is called a court baron . . . . and of that the freeholders being suitors be judges . . . . The second is a customary court, that doth concern the copyholders, and therein the lord or his steward is the judge.' And again (58 b): 'Concerning the institution of this court, by the laws and ordinances of ancient kings, and especially of King Alfred, it appeareth that the first kings of this realm had all the lands of England in demeane and les grand manors et royalties they reserved to themselves, and of the remnant they, for the defence of the realme, enfeoffed the barons of the realme with such jurisdiction as the court baron now hath, and instituted the freeholders to be judges of the court baron.'

It is not clear from this passage whether Lord Coke considered that the jurisdiction in those manors which the king granted to his subjects was simultaneously with the grant created by the king, or whether he thought that it had been in existence before the king parted with the manor, and being so in existence passed with the manor to the grantee thereof. There would be difficulties in either view. But one thing seems clear; that Coke considered the jurisdiction to be somehow peculiarly connected with a manor as distinguished from land which was not a manor; just as we do at

[1] *Placita in Curiis Magnatum Anglie.* Edited for the Selden Society by F. W. Maitland. London: Quaritch. 1889.

the present day. Without stopping to consider the various characteristics which are to be held essential to a 'manor' in the modern sense of the word [1], the simple fact of the existence of the legal doctrine that at least two freehold tenants are essential to a manor, and that when their number is reduced below two, the manor ceases to exist and becomes a reputed manor, is sufficient to illustrate the difference in our minds between a 'manor' and an estate.

Now, it is impossible that there can have been a conception familiar to the minds of lawyers without a word to represent it. What was it called? Nothing can be suggested except the word 'manerium.' Then, if we find the word 'manerium' used in a sense inconsistent with the modern idea of a manor, or in a sense which must include other things, we shall conclude that there was no such conception as a modern manor known to the people who so used the word 'manerium.'

The thing itself, a manor in the modern sense of the word, may very well have existed; but if there was no word appropriated to denote it, it can have had no peculiar characteristics to distinguish it from other things. The word 'manerium' may have been properly applied to what we should now call a manor; but if it was also applied to other things as well, it cannot have possessed the modern 'connotation' of the word 'manor.' That it was so applied, long after the commencement of legal memory, from which time all manors must according to modern theory have existed, will appear from the following citations.

In the second volume of the Registrum Palatinum Dunelmense (Rolls Series), p. 1156, there is a lease by the Bishop, dated 1312, of 'capitale messuagium nostrum, et dominicam terram nostram arabilem, de Fennewik, cum dominico prato nostro et pastura dictis messuagio et terrae pertinentibus;' but the registrar calls it in the margin 'Dimissio *manerii* de Fennewik ad firmam.' Here are no free tenants; and moreover there is no manor of Fennewik.

There is an extract quoted in the English Historical Review, i. 736–7, for another purpose, which describes the abbot of St. Edmund's holding an inquisition in 18 Edw. I 'ad ulteriores portas manerii sui de Herlawe.'

In the Rolls edition of Rishanger's Chronica et Annales, at p. 476, there is an account of a fire which 'molendinum aquaticum Camerarii apud Redburnam funditus corripuit. Qui spiraculo venti intolerabilis, ab occidente provenientis adjutus, toti manerio exitium et adnihilationem minabatur; sed gratia Dei, et densitate et obumbratione arborum, nullum pertulit incendium nec laesuram. Congruum est igitur fundum et maneria arborum densitate et amoeni-

[1] See for instance the opening sentences of Scriven on Copyholds.

tate circumdari, tum propter ventorum irruptiones, tum propter hujusmodi ignis varios casus et consumptiones.'

In the survey of the possessions of the Bishopric of Durham made in the time of Bishop Hatfield (1345–1381) and printed for the Surtees Society, the word 'manerium' is frequently used in a sense different to that which it bears at the present day. Thus after describing the various tenants at Heighington and their rents and services, and the mill, the forge, and other sources of revenue there arising, the survey goes on to say (p. 19), 'Et est ibid. j manerium edificatum cum j boveria et ij grangiis, et nichil valet ultra reprisas. Et est ibid. j curtilagium . . . Et sunt ibid. xxviij bov. terrae, quaelibet bov. cont. xv acr., precium acr. 5*d*.'

At another township (p. 22), there is 'unum manerium edificatum de grangia et boveria, cum j camera et salario pro ballivo juxta portam.'

At another (p. 40), 'Johannes Dolverton Carpentarius ten. j placeam juxta portam manerii.'

At another (p. 72), a tenant holds 'quoddam situm manerii,' containing four acres, at a rent of four pence; and this entry appears in a list of copyhold tenants.

At another (p. 112), 'Johanna de Berawby tenet situm manerii Domini Episcopi ibidem, vocatum Courtgarth, et reddit per annum 12^{d}.'

At Stockton the jurors say (p. 169), 'quod est ibidem quoddam manerium edificatum, cujus situs nichil valet ultra reprisam domorum ibidem.'

Of certain tenants at Norton it is said (p. 176) that 'quando Dominus Episcopus faciet domum de novo, vel reparari faciet manerium suum de Stokton, erunt ibidem in auxilium levationis meremii domus ibidem.'

If the people who wrote these passages had been asked why a court belonged to the owner of some particular manor, it is impossible to suppose that they would have answered simply, 'Because it is a manor;' though probably most persons of the present day would give that answer.

There does not seem to be any insuperable difficulty in referring the manorial jurisdiction to a general principle of feudal law by which the mere relation of superior and vassal carried with it the subjection of the vassal to the superior's jurisdiction.

That there was in fact such a principle in the feudal system seems to be agreed. Thus Bishop Stubbs speaks of feudal government as a graduated system of jurisdiction based upon land tenure, in which every lord judged, taxed, and commanded the class next below him (Hist. Eng. i. 256).

But although this is probably quite correct, it is not easy to cite a direct authority to prove it. The system has to be reconstructed like the mastodon from its remains and *vestigia*[1]. If such a state of things as is described by Bishop Stubbs in the passage quoted ever existed in its purity, it must very soon have been contaminated or discoloured by various influences. Natural equity may have required that an unlettered soldier whose prowess had been rewarded with a dukedom or a county, or any other superiority, should not decide between his litigating vassals without either a doctor Bellario or perhaps a certain number of his other vassals, to advise as to the law involved. Or the growing power of the sovereign encroached upon the seigneurial jurisdiction by asserting the existence of a class of pleas belonging exclusively to the crown, 'placita coronae;' a class which would naturally extend with the growth of the power of the crown. Criminal jurisdiction, if indeed it ever was considered to be involved in tenure, is evidently that part of the seigneur's jurisdiction which would most readily become 'placitum coronae;' and next, perhaps, appeals. And even beyond that class, astute lawyers might set up the theory that, although the jurisdiction was in the inferior court, yet that court could only be set in motion by a royal writ.

The notion that the seigneur was bound to call to his assistance his vassals (i.e. his *homines* or homagers, part of whose 'services' consisted of suit to the court of their lord of whom they held their lands) seems to have been one of the earliest and most universal of the disturbing influences which modified the seigneur's right of jurisdiction. In fact it has been treated by some writers as an essential feature of the feudal relation. Brussel, however, writing in 1727 (Usage de fiefs, lib. ii, cap. 14) puts it in a way more agreeable to the theory of an originally simpler system.

'C'étoit une maxime *universellement pratiquée en France*, que tout Suserain avoit cour plénière sur ses vassaux, au regard de leur fiefs. Mais pour que le jugement fût valable, le suserain étoit tenu d'y apeller un certain nombre de Pairs de fief du vassal, c'est-à-dire, d'autres vassaux qui tenoient leurs fiefs en un égal degré de noblesse.'

The treatise known as 'Libellus antiquus de beneficiis,' which was composed in the twelfth century, seems to show that the judicial duties of the 'pares,' at all events in Germany, arose from their function as witnesses, coupled with the notion that no one was

[1] The sources from which the feudal system has to be reconstructed are most diverse. Outside of England, Scotland, and the different countries on the continent of Europe, valuable information is to be obtained from the laws of Malta, Jerusalem, Cyprus, and Canada. Under these circumstances the few citations given in this paper must be accepted as illustrations only, and not weighed as proofs.

entitled to be a witness unless he were of equal rank in the lord's court with the man against whom he appeared.

Beaumanoir, who describes the customs of Beauvoisis at the end of the thirteenth century, has a curious passage about these 'pares curiae,' which illustrates the entry in Domesday relating to the lending of tenants by one lord to another for the purpose of a court, while at the same time the way in which he puts it cannot fail to suggest that the necessity for the concurrence of the 'pares' was in point of historical development, an addition overlaid upon the original and fundamental right of jurisdiction existing in the seigneur alone:—

'Li aucun segneur ne sunt pas bien aaisié de fere jugement en lor cours porce qu'il n'ont nul home de fief, ou por qu'il en ont trop poi; neporquant por ce ne doivent il pas perdre lor justices, ainçois y a certaine voie, lequele noz avons veu aprover par jugement. Car il poent requerre a lor segneur qu'il lor preste de ses homes, à son coust; por li conseillier à fere tel jugement, et ses sires li doit fere; et adont il meismes pot rendre jugement en se cort, en le presence des homes que se sires li a prestés. Mes bien se garde que s'on apele de li de faus jugement ou de defaute de droit, li perix de l'apel torne sor li et non pas sor les homes son segneur qu'il emprunta. Tout soit ce que li home li soient presté por conseillier, por ce ne sunt il pas tenu à fere jugement, s'il ne s'i metent solement; car s'il jugoient de lor volenté, on porroit apeler d'aus de faus jugement, et converroit qu'il feissent lor jugement por bon. Et s'il ne voelent jugier, li jugemens quiet sor le segneur qui les emprunta.... Quant aucuns povre sires est, qui n'a pas homes qui puissent fere jugement en se cort, et qu'il n'emprunte nul de ses pers, ou por se povreté, ou por se paresse, ou por ce que ses sires ne l'en veut nul prester, tout soit ce qu'il ne li doit pas refuser: il ne pot fere jugement en par soi. Et por ce, en tel cas, doivent aler li plet par devant l'avant signeur, liquix a homes por fere jugement' (chap. 62, p. 415, of Beugnot's ed.).

And in chapter 67 (p. 456), he says, '*Le Coustume de Biavoisis est tele, que* li segneur ne jugent pas en lor cours, mais lor home jugent.'

Any theory which looks upon certain causes as being reserved for the royal jurisdiction involves the notion that the jurisdiction in causes not so reserved must be derived from a crown grant, and must almost necessarily produce a state of things in which the greater lords are supposed to possess a fuller jurisdiction than their sub-tenants.

It is obvious that so far as regards the jurisdiction supposed to be involved in the mere relation of superior and vassal there can be no difference between tenants in capite and subordinate seigneurs. To use our own phraseology, whatever is implied in the grant of a fief must enure through all degrees of subinfeudation. When-

ever, therefore, we find the great tenants in capite enjoying, or claiming, rights of jurisdiction which do not belong to subordinate seigneurs, there must be some idea that a grant of jurisdiction is independent of the grant of the fief and capable of being withheld by the grantor. Mr. Earle (Land Charters, Introd. p. xxiii) notices the circumstance that sac, soc, etc., are found in writs long before they are found in grants; and that they are not found in grants till the time of Edward the Confessor at the earliest. Mr. Henry Adams (Essays in Anglo-Saxon Law, Boston, 1876) concludes from the latter circumstance that these grants indicate the origin of private jurisdictions; whereas it is possible that they only indicate the origin of the idea that it was necessary to express the jurisdictions in the grant. Mr. Earle at all events finds that such territorial prerogatives were in existence and exercised before they appear in the grants.

It would be a mistake to suppose that the theory that jurisdiction must be expressly granted by the crown, even if this theory were the offspring of an increase in the royal power, is incompatible with enormous claims on the part of the great vassals. Whatever rights the crown could successfully assert to be reserved out of its original grant to its tenant in capite, must necessarily be excluded from the jurisdiction of all inferior vassals; while, on the other hand, the supposition of special favours to the great lords would readily provide an explanation to reconcile a theory which limited the jurisdictions to be implied in a feudal grant, with the notorious exercise of much wider powers by a few powerful nobles. And with regard to the origin of these wider powers, there is no difficulty in supposing that the great seigneurs, in times when the crown was weak, would encroach on the crown, just as in the opposite case the crown encroached on the seigneurs.

The encroachment of the royal power in France by means of reserved *placita coronae*, consequent upon the ordinance of Philip Augustus in 1190, is described by Hallam in language so graphic that we can do no better than quote his words:—

'This (viz. the royal court) began rapidly to encroach upon the feudal rights of justice. In a variety of cases, termed royal, the territorial court was pronounced incompetent; they were reserved for the judges of the crown; and in every case, unless the defendant excepted to the jurisdiction, the royal court might take cognisance of a suit, and decide it in exclusion of the feudal judicature. The nature of cases reserved under the name of royal was kept in studied ambiguity, under cover of which the judges of the crown perpetually strove to multiply them. Louis X, when requested by the Barons of Champagne to explain what was meant by royal cases, gave this mysterious definition: "Everything which by right

or custom ought exclusively to come under the cognisance of the sovereign prince." Vassals were permitted to complain in the first instance to the king's court, of injuries committed by their lords' (M. A., chap. ii. pt. 2).

These encroachments led to resistance, of which one result was an ordinance of Philip the Fair in 1302: 'Hoc perpetuo prohibemus edicto, ne subditi, seu justiciabiles, praelatorum aut baronum nostrorum aut aliorum subjectorum nostrorum, trahantur in causam coram nostris officialibus, nec eorum causae, nisi in casu ressorti (=appeal) in nostris curiis audiantur, vel in alio casu ad nos pertinenti[1].'

Here we find the crown claiming the cognisance of appeals; a distinct landmark in its course of invasion.

Now, supposing it were an established fact that the feudal system, as conceived down to at least the end of the thirteenth century, involved the notion of an inseparable connection between seigniory and seigniorial jurisdiction, subject to the modifications introduced by the municipal law, and if it were also established that those modifications were principally due to crown encroachments, we should expect to find the connection recognised in transactions outside the domain of municipal law. But this is precisely what we do in fact find. The continental possessions of our English kings, and the possessions of the kings of Scotland in England, gave rise to a variety of complications which, as distinguished from municipal disputes, we may call international. It is impossible to read history without seeing throughout these disputes the general recognition of the close connection between tenure and jurisdiction. Thus for instance Edward I, before returning to England after his accession, went to Paris to do homage for the lands he held of the French crown; and afterwards, when his vassal, Gaston de Béarn, was misbehaving himself, Edward proceeded to bring him to trial. Gaston appealed to the King of France as suzerain, who gave sentence for the King of England. But it is needless to multiply instances; the most famous is perhaps the case of the judgment of

[1] With this may be compared the English Statute of Citations (23 Hen. 8, cap. 9) which at a much later date restrained very similar encroachments in the ecclesiastical hierarchy: 'That no manner of person shall be from henceforth cited or summoned or otherwise called to appear . . . before any ordinary archdeacon, commissary, official, or any other judge spiritual out of the diocese or peculiar jurisdiction where the person which shall be cited, summoned, or otherwise (as is aforesaid) called shall be inhabiting and dwelling . . . except . . . for any spiritual offence committed by . . . the spiritual judge . . and except also it be by or upon matter or cause of appeal . . . or in case the bishop or other immediate judge or ordinary dare not nor will not convent the party . . . or in case the bishop or any inferior judge . . . make request . . . to the archbishop, bishop, or other superior ordinary or judge . . . provided always that it shall be lawful to every archbishop . . . to cite . . . for causes of heresy.' Was it the Church that furnished the example and suggestion for the secular encroachments, or was the thing so natural in itself that it was the necessary development of every such system of jurisdictions successively subordinate to one another?

Edward I between John Balliol and Robert Bruce. The wide prevalence of this notion may be illustrated from a passage in the Orkneyinga Saga (pp. 10–14, ed. Anderson), where King Olaf of Norway, when required to decide between Brusi and Thorfinn as to the Orkneys, demands their homage before adjudging. It is quite unnecessary to attribute to a coarse desire of territorial aggrandisement either the conduct of King Olaf here or that of King Edward in the *Bruce* v. *Balliol* case. The latter, however, cannot even by Burton be discussed impartially.

The feudal system in England was introduced partly by William the Conqueror and partly before his time. It was introduced on the top of a legal system previously existing. It was introduced with modifications arising from the peculiar circumstances of the case. But, with whatever modifications, it was *the* feudal system; a system which, subject to divers differences, existed not only in Normandy, but in most other parts of Europe. We find accordingly in our own municipal law the traces, not only of the system above described, but also of a process of modification and encroachment corresponding with the changes observable in other countries, and differing only by reason of the different circumstances of our own legal and constitutional history. And these traces lead us straight to the court baron.

In the so-called Laws of Edward the Confessor it is said of the 'barones qui suam habent curiam de suis hominibus,'—

'Si placitum de hominibus aliorum baronum oritur *in curiis suis*, adsit ad placitum regis justitia.' (Cap. 9.)

'Archiepiscopi, episcopi, comites, barones, et omnes qui habuerint sacham et socham, thol, team, et infangthefe, etiam milites suos et proprios servientes sub suo friborgo habeant. Et item isti suos armigeros vel alios sibi servientes sub suo friborgo. Quod si cui forisfacerent, et clamor vicinorum de eis assurgeret ipsi tenerent eos rectitudini *in curia sua*; illi dico qui haberent sacham et socham thol et theam et infangthefe.' (Cap. 21.)

Here we have the existence of private jurisdictions; but the jurisdiction in criminal matters is confined to such as have sac and soc, thol and team, and infangthefe; and whenever the homager of another lord is to be tried, the 'justitia regis' must be present; not (apparently) that the jurisdiction of the lord in that case is ousted, but there must be present this independent and competent assessor.

It appears here that the essential requisite for this criminal jurisdiction is to possess *sac* and *soc*, *thol* and *theam*, and *infangthefe*. Many have been the interpretations given to these words. Professor Maitland gives us yet another. The meaning becomes material to

the point we are considering if the use of general words in a grant implies the possibility that without their use the things they denote would not pass.

In Domesday we have a passage about lending tenants for a court (f. 193 b):—

'Hanc terram tenuerunt sex sochemanni. Tres istorum sochemannorum accommodavit Picotus Rogerio comiti propter placita sua tenenda, sed postea occupaverunt eos homines Comitis et retinuerunt cum terris suis sine liberatore.'

This passage connects our feudal system with that described by Beaumanoir.

In Mr. Bigelow's Placita Anglo-Normannica we read of a tenant by knight-service of the Abbot of Abingdon fined before the abbot for damaging a watercourse (p. 62); of the abbot recovering the service of a knight's fee in his own court (p. 74); of the abbot recovering services for a 'manerium VII hidarum,' as to which the account says: 'Haec omnia disrationata fuere praecepto Henrici regis apud Oxeneforde in domo Thomae de Sancto Johanne et ubi abbas tunc curiam suam fecit, eo quod ille Thomas suus homo erat.' In none of these is there any suggestion that the abbot was exercising any manorial jurisdiction, and in the last-mentioned case it was the tenant who held the *manerium*, whatever that may have been. The *praeceptum regis* is to be noted here. It occurs *temp.* Hen. I (p. 78).

Mr. Bigelow cites (p. 98) a writ of Hen. I: 'Si Goscelinus quid clamaverit in terra Sanctae Mariae de Abbendona, quam habet apud Hyllam, praecipio ut ipse Goscelinus eat in curiam abbatis, et ipse abbas sit ibi ei ad rectum et defendo ipsi abbati quod non respondeat inde Goscelino in alio loco.' And another (p. 121), directed to one Ralph Bassett: 'Praecipio quod facias habere Vincentio abbati Abbendonae curiam suam in Oxeneford, ita bene et plenarie sicut unquam ipsa ecclesia Abbendonae vel aliquis antecessorum suorum melius et plenarius et honorificentius habuit. *Et homines sui non placitent extra curiam suam, nisi abbas prius defecerit de recto in curia sua*, et sicut poteris inquirere per legales homines de Oxeneforde quod habere debeat curiam suam.'

As of Stephen's reign, Mr. Bigelow quotes (p. 163) a striking recognition of seigneurial right. It is a writ which says: 'Si cognoscis quod debeas tenere virgatam terrae quam tenes in Quedesleya de abbate Glocestriae, tunc praecipio tibi quod desicut abbas dicit quod rectum in ea non habes, aut eas in curiam ejus dirationare quod tua esse debeat, vel dimitte ei terram suam sicut justum fuerit.' There is not a suggestion here of a manor, or of any particular court of the abbot. It is assumed that if he was superior, he had a court as a matter of course.

In the treatise known as 'Leges Henrici primi,' which Professor Maitland thinks may be safely attributed to that king's reign, it is not easy to disentangle the strictly seigneurial jurisdiction from that of the hundred and county courts and from what is claimed by the crown. It is laid down (cc. 10 & 59) that 'injustum judicium' and 'defectus justitiae' are pleas of the crown; and in cap. 8 there is a statement which suggests that the conflicting claims of the lord and the hundred are settling down into a compromise whereby the lord is simply to produce his men and the hundred is to judge them.

'Omnis dominus secum tales habeat' [sc. at the hundred] '*qui ei justiciabiles sint*, tanquam eos si peccaverint ad rectum habiturus, vel pro eis forsitan rationem redditurus[1].'

A passage in cap. 19 should be remarked: 'Quarundam terrarum maneria dedit [sc. Rex] sed soknam sibi retinuit singularem et communem. Nec sequitur socna Regis data maneria, sed magis est ex personis.' It is impossible that the word 'maneria' can be here used in the sense in which Bishop Stubbs (Const. Hist. i. 400) uses it, as distinguished from baronies.

We do not find in this treatise any mention of manorial jurisdiction as distinguished from seigneurial, though there is plenty about 'barones socham suam habentes' (cc. 9 & 24), 'halimoto soccam habentium' (cap. 9), 'socam placitorum quam quidam habent in suo de suis, quidam de suis et extraneis sive in omnibus sive in quibusdam causis' (ib.); but to know how far such passages are material to our present point, it is necessary to know more exactly the meanings of *sac* and *soc* than we do at present.

Cap. 55 distinguishes *manerium* from *honor*; but the jurisdiction referred to must clearly be seigneurial and not manorial:—

'Omni Domino licet submonire hominem suum ut ei sit ad rectum in curia sua; et si residens est ad remotius *manerium* ejusdem honoris unde tenet ibit ad placitum si dominus suus submoneat eum. Si Dominus ejus diversos *feodos* teneat, non cogitur per legem homo unius honoris in alium ire placitum [qu. placitatum?] nisi de alterius causa sit ad quem dominus suus summonuerit eum.'

As to the 'pares' we read: 'Unusquisque per pares suos judicandus est' (cap. 31) and 'nemo solus praesumat vel ab aliquo cogatur judicium celebrare' (cap. 32). 'Si quis in curia sua vel in quibuslibet agendorum locis placitum tractandum habeat, convocet pares et vicinos suos ut inforciato judicio gratuitam et cui contradici non possit justitiam exhibeat. Defectus quippe justitiae et violenta recti eorum destitutio est qui causas protrahunt in jus regium vel jurisdictiones dominorum' (cap. 33). The last words

[1] See also cap. 57.

seem to be a reminiscence of the feudal appeal to the next superior.

With regard to the reign of Hen. II we find in Bigelow's Placita Anglo-Normannica a writ of right as follows (p. 210):

'Robertus comes Legrecestriae Reginaldo de Warenna salutem. Praecipio quod sine dilatione *plenum rectum teneas* Roberto de Mandevill, de terra quae fuit Willelmi de Mandevill fratris ejus de Diganeswell cum pertinentiis suis, *quam clamat tenere de te.* Et nisi feceris Robertus de Valoniis faciat. Et nisi fecerit ego faciam fieri. Teste Gaufrido Labbe. *Per breve regis* de ultra mare.'

We have also (p. 212) an account of the king entertaining a claim on the ground of default of right in the archbishop's court in a suit by a tenant of the archbishop for some land; and (p. 265) a 'fine' in the lord's court concerning land held of the lord.

In the Constitutions of Clarendon of 1164 (Stubbs, Sel. Ch. 139) we find:—

'Si calumnia emerserit inter clericum et laicum, vel inter laicum et clericum, de ullo tenemento quod clericus ad Eleemosinam velit attrahere, laicus vero ad laicum feudum, recognitione duodecim legalium hominum per capitalis justitiae regis considerationem terminabitur, utrum tenementum sit pertinens ad eleemosinam sive ad laicum feudum coram ipso justitia regis. Et si recognitum fuerit ad eleemosinam pertinere, placitum erit in curia ecclesiastica, si vero ad laicum feudum, nisi ambo de eodem episcopo vel barone advocaverint, erit placitum in curia regia. Sed si uterque advocaverit de feudo illo ante eundem episcopum vel baronem, erit placitum in curia ipsius.'

In Glanville we find the lord's courts still in active work: 'Solent autem placita ista' [sc. writs of right in the lord's court] 'in curiis dominorum vel eorum qui loco dominorum habentur deduci secundum rationabiles consuetudines ipsarum curiarum quae tot et tam variae ut sunt in scriptum de facili reduci non possunt' (xii. 6).

But there are evident signs of encroachments on the part of the king:—

'Secundum consuetudines regni nemo tenetur respondere in curia domini sui de aliquo libero tenemento sine precepto domini regis vel ejus capitalis justitiae. Ita dico si laicum fuerit feodum petitum' (xii. 15).

Notwithstanding this reference to the *consuetudines regni*, it is clear that the principle is not so ancient that its limits are clearly defined. Thus after stating how the tenant incurs a forfeiture by certain offences against his lord, the author proceeds:—

'Sed utrum in curia domini sui teneatur quis se defendere versus dominum suum de talibus objectis quaero, et utrum dominus suus

possit eum ad id faciendum distringere per considerationem curiae suae sine precepto domini regis vel ejus justitiae vel sine brevi domini regis vel ejus capitalis justitiae. Et quidem de jure poterit quis hominem suum per judicium curiae suae deducere et distringere ad curiam suam venire .... Item quaero utrum dominus possit distringere hominem suum veniendo in curiam suam ad respondendum de servitio unde dominus suus queritur quod ei deforciet vel quod aliquid de servitio suo ei retro sit. Et quidem bene poterit de jure hoc facere etiam sine precepto regis vel ejus justitiae' (viii. 1).

The option given of choosing the grand assize instead of the duel, was the means of drawing away pleas from the lord's court (ii. 8, 9); and there was considerable inducement to the lords to acquiesce in encroachment, for if the case were appealed the court of the lord had to maintain its own judgment by the duel, and unless this was done successfully, the lord was *in misericordia*, and forfeited his court for ever (viii. 9).

Such as it was, however, the jurisdiction of the lord clearly appears to be seigneurial and not manorial. Speaking of 'aids' the author says:—

'Possunt autem domini tenentes suos ad hujusmodi rationabilia auxilia reddenda etiam suo jure sine precepto domini regis vel ejus capitalis justitiae *per judicium curiae suae* distringere .... Si ergo ad hujusmodi rationabilia auxilia reddenda posset aliquis dominus tenentes suos ita distringere, multo fortius districtionem eo modo licite poterit facere pro ipso relevio suo vel pro necessario servitio suo de feodo suo sibi debito' (ix. 8).

It has never been suggested that aids and reliefs were only demandable by the lord of a manor, and not by other superiors. Yet the author mentions 'curia sua' without making any distinction between them.

Then again, the form of a writ for a widow claiming her dower is given (vi. 5) as follows:—

'Rex M. salutem. Praecipio tibi quod sine dilatione plenum rectum teneas A. quae fuit uxor E. de una hida terrae in villa illa quam clamat pertinere ad rationabilem dotem suam *quam tenet de te* in eadem villa, etc., quam N. ei deforciat.' And then it is added: 'Tractabitur placitum id in curia warranti per hoc breve, donec probetur curiam ipsius de recto defecisse.' (The *warrantus* is of course the heir; of whom the widow holds her dower.) This is practically the same form as was preserved in the Register; its importance will be discussed when we deal with the other evidence from that source.

Then in Magna Charta we find three passages which must be considered in connection with one another: 'Breve quod vocatur praecipe de cetero non fiat alicui de aliquo tenemento unde liber

homo amittere possit curiam suam' (c. 34, the numbering being taken from John's Charter in Stubbs' Sel. Ch.).

'Nullus liber homo capiatur vel imprisonetur, aut dissaisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum vel per legem terrae' (c. 39).

'Si quis fuerit disseisitus vel elongatus per nos sine legali judicio parium suorum de terris castallis libertatibus vel jure suo statim ea ei restituemus: et si contentio super hoc orta fuerit, tunc inde fiat per judicium viginti quinque baronum de quibus fit mentio inferius' (c. 52).

It is clear that the object of cap. 52 at least is not the sanctity of trial by jury; and that cap. 34 is directed to the preservation of the seigneurial rights. It may reasonably be suspected that cap. 39 also was directed merely to maintaining the lord's court against crown encroachments. If so, the antithesis 'legale judicium parium suorum vel per legem terrae,' which taxes Lord Coke's ingenuity (2 Inst. 45–55), would be explained by supposing that the barons, recognising that certain inroads upon their seigneurial jurisdictions were too firmly established by 'legem terrae' to be objected to, were minded to prohibit any further invasions. Any such suspicion is perhaps heretical; but it may be not altogether irrelevant to compare this chapter of Magna Charta with the following passage from the Leges Henrici I, which cannot have anything to do with trial by jury:—

'Quia nil a nullo exigi vel capi debet nisi de jure et ratione per Legem terrae et justitiam et per judicium curiae, sine dolo, prout statutum est maxima consideratione procerum et bonorum predecessorum totius regni' (cap. 8).

In 1246 the Statute of Merton, in allowing suit of court to be done by attorney, indicates the decay of the original theory; and in 1267 the Statute of Marlebridge (cap. 9) prohibited distress for suit of court except where the lord could prove an express reservation or recent enjoyment, thereby showing that any idea of the necessary connection between tenure and suit of court had ceased to exist. Cap. 20 of the latter statute further illustrates the process:—

'Nullus de cetero (excepto domino rege) teneat placitum in curia sua de falso judicio facto in curia tenentium suorum: qui [quia?] hujusmodi placita specialiter spectent ad coronam et dignitatem domini regis.'

Upon which Lord Coke remarks, 'Before the making of this statute, if a false judgment had been given in a court baron, this should have been redressed in the court baron of the lord next above him, and so upward of the lords paramount' (2 Inst. 138).

Bracton writes with an evident bias in favour of extending the

jurisdiction and powers of the crown. He considers the king to be the source of all jurisdiction, and the guardian of the peace, whose duty it is to cause all the laws to be observed. But *privilegia* may belong to a subject by special grant, as for instance the 'libertas tenendi placita per breve de recto' (fos. 55, 56). The jurisdiction of the inferior lords is recognised, but it is restrained by a variety of restrictions and limitations which, when viewed together, must produce the impression of being encroachments.

Thus, although he lays it down that the king's writ is necessary to start the jurisdiction (fo. 112), yet elsewhere he admits that there are certain debts and injuries which can be sued for without such a writ (154 b, 156); and at fo. 154 b may be seen the way in which the notion of the peace being the king's peace was used for the purpose of encroaching on the local jurisdictions. Various causes are enumerated on fo. 329 b for superseding the lord's jurisdiction, among which is the following:—

'Item quia capitalis dominus omnino recusat tenere rectum, vel cum nemo sit *vel inveniatur* in curia qui rectum teneat, vel *quia ipse dominus nullam curiam habet* nec erit, ut videtur, ad superiores dominos capitales, praeterquam ad comitatum recurrendum, cum in brevi contineatur, quod si talis nominatus non fecerit, quod vicecomes immediate se intromittat.' The expression 'ut videtur' shows us the astute crown lawyer tentatively suggesting a new ground for encroachment.

He too gives us on fo. 329 the form of a writ of right of dower addressed to the heir:—

'Rex tali *heredi* salutem. Praecipimus tibi quod sine dilatione *plenum rectum teneas* tali mulieri de tertia parte tantae terrae, etc., quam clamat esse de rationabili dote sua, etc., et *tenere de te*, etc.'

The seigneurial character of the jurisdiction of the lords appears from a passage at fo. 330, in which, describing how the sheriff is to procure proof of the lord's default, the author says:—

'Accedat ad curiam illius domini capitalis, si curiam habuerit et curiam tenuerit, vel si curiam non habuerit tunc ad locum ubi habuerit reseantiam, dum tamen hoc sit in *feodo* illo ubi terra illa est quae petitur, et si nihil horum habuerit vel fecerit, tunc sufficit quod defaltam probet quo loco voluerit super *feodum* illud, secundum quod ipse dominus electionem habuerit tenendi curiam suam quo loco voluerit super *feodum* suum (cum extra non liceat de jure).'

It is impossible to suppose that if a *manor* was thought to be connected with this jurisdiction, it would not have been mentioned in this passage.

The Statute of Quia Emptores put an end to subinfeudations; and consequently to the creation of any fresh jurisdictions, whether seigneurial or manorial. Whatever exist now, must have existed

then; and if it be true that our modern view of the relation of the court baron to the manor was not held in the time of Edward I, the change is one which demands explanation.

It would seem that the development of the law of England in the thirteenth century produced among other things the desire for a more accurate definition of terms. We find for instance that Bracton (fo. 434), in the course of describing the amount of detail as to position and otherwise, with which the litigant must specify the subject-matter of complaint, is led into an explanation of the different meanings of 'villa,' 'mansio,' 'manerium,' 'tenementum,' etc. In another part of his treatise (fo. 212) he has a somewhat different description of a 'manerium.' It is clear from these passages that this word was in his time appropriated to something larger than 'mansio,' 'messuagium,' or 'domus.' It might indeed be so large as to comprise more than one 'villa.' But there is no suggestion here that it differs from 'mansio' in anything but extent. Now, this difference in extent alone is precisely that which would involve of necessity the existence in a 'manerium' of subtenants. The *manerium* was too large to be in 'dominico,' the *mansio* was not [1]. It is easy to see, under these circumstances, how the word 'manerium' came to mean what we now understand by a 'manor.' Add to this, that by the operation of the Statute Quia Emptores, the mesne tenures superior to the manerium, together with all other mesne tenures, would gradually die out, and the result would necessarily be the present state of things, in which every freeholder holds of the crown except the freehold tenants of a manor, and the court baron is peculiar to a manor.

But the traces of the ancient theory were preserved in the Register of Writs; a collection of forms of the highest authority in point of law, and I venture to think of equal authority on a historical question such as that which is here discussed.

The first writ in the book is a writ of right patent for land held of some royal honour or manor:—'Elizabetha Dei gratia Angliae Franciae et Hiberniae Regina, fidei defensor, etc., Ballivis suis de I. salutem. Praecipimus vobis quod sine dilatione plenum rectum teneatis W. B. de uno mesuagio cum pertinentiis in M.' [not 'in I.' be it observed] 'quod clamat tenere de nobis per liberum servitium unius denarii per annum pro omni servitio, quod R. K. ei deforciat. Et nisi feceritis vicecomes Eborum faciat, ne amplius inde clamorem audiamus pro defectu recti. Teste me ipsa, etc.'

Here W. B. is the plaintiff, R. K. is the defendant (to use our modern terms, instead of demandant and tenant), and the ballivi

[1] It is perhaps superfluous to mention that the occupation by villeins was not inconsistent with the land being nevertheless *dominicum*. See Hatfield Survey, passim.

are the court, or judges, to whom the writ is directed, and who are thereby directed 'plenum rectum tenere' to the plaintiff. The lands in question are held of the king, not *in capite*, but *ut de honore* or the like, as more fully explained in the next following form:—

'Rex ballivis suis, vel ballivis Katerinae reginae Angliae consortis nostrae charissimae, honoris Peverellae in comitatu Lincoln. salutem, vel ballivis de Soka de I. vel custodi honoris de I. in comitatu Essex salutem. Praecipimus vobis vel tibi quod sine dilatione plenum rectum teneatis vel teneas A. de B. de decem acris terrae cum pertinentiis in C. quas clamat tenere de nobis, vel de praedicta regina, vel de praedicta Soka, vel de praedicto honore, per liberum servitium faciendi sectam ad curiam nostram vel praedictae reginae honoris praedicti in comitatu praedicto de mense in mensem, vel per liberum servitium tanti per annum pro omni servitio: quas R. de K. ei deforciat. Et nisi feceritis, vicecomes, etc., faciat; ne amplius, etc.'

Except in the case of the king or queen, or of the lord being out of the realm, the writ was to the lord himself; as, 'Rex Ioanni duci L. salutem. Praecipimus tibi quod sine dilatione plenum rectum teneas A. de B. de tanto cum pertin. in G. quod clamat tenere de te per liberum servitium unius denarii per annum, etc. Et nisi feceris, etc.'

The writ in all these cases is not to the defendant, but to the person whose jurisdiction is appealed to.

If the land was held of the king *in capite*, the writ was the ordinary *praecipe in capite*:—

'Rex vic. Eborum salutem. Praecipe A. quod juste et sine dilatione reddat B. unum messuagium cum pertinentiis in H. quod clamat esse jus et hereditatem suam et tenere de nobis in capite, et unde queritur quod praedictus A. ei injuste deforciat. Et nisi fecerit, etc.'

Here the writ is directed, *viâ* the sheriff, to the defendant. The concluding part of the writ, represented by the 'etc.' directs the sheriff to summon the defendant to Westminster, as in the form next cited.

Where the king was not the immediate lord, the question might be litigated in the King's Court, by reason of the immediate superior waiving his jurisdiction, and giving licence to his tenant to sue his writ of right in the King's Court or the Common Pleas before the justices (Fitzh. Nat. Brev. 2 F); and then the form of the writ, noticing this, ran as follows:—

'Rex vicecomiti Lincoln. salutem, Praecipe A. quod juste et sine dilatione reddat B. unum messuagium cum pertinentiis in N. quod clamat esse jus et hereditatem suam, et unde queritur quod praedictus A. ei injuste deforciat. Et nisi fecerit, et praedictus B.

fecerit te securum de clamore suo prosequendo: tunc summoneas per bonos summonitores praedictum A. quod sit coram justitiariis nostris apud Westm. tali die ostensurus quare non fecerit. Et habeas ibi summonitores, et hoc breve. Teste me ipso apud Westm., etc. *Quia W. capitalis dominus feodi illius nobis inde remisit curiam suam*' (Registr. fo. 4).

In all these writs we have been considering there is no mention of a manor, though all other essentials to the jurisdiction must be expressed in the writ. And it will probably be conceded by any one possessing even a moderate acquaintance with these forms that, if the existence of a manor had been conceived to be essential to the lord's jurisdiction, we should probably have found it mentioned in the writs.

No doubt there is the little writ of right close, which lay for the socage tenants of ancient demesne (see 4 Inst. 269), and ran as follows:—

'Rex ballivis suis de A. salutem. Praecipimus vobis quod sine dilatione et *secundum consuetudinem manerii* nostri de A. plenum rectum teneatis L. de uno messuagio cum pertinentiis in I. quod G. ei deforciat, ne amplius inde clamorem audiamus pro defectu recti. Teste, etc.' (Registr. fo. 9). There were the necessary variations when the manerium was in the hands of a subject.

But it seems that these tenants were not always considered as freeholders, for the note in the Register, immediately preceding the form of writ, is 'Fait assavoir que le petit briefe de droit gist tout dits [qu. toutfoitz] pour sokmans que sont del auncien demesne le roy, quar nul sokman poet empleader auter sokman de terre ne de tenement per auter briefe que per petit briefe de droit quod sequitur. Et en cest briefe ne serra pas dit, quod clamat tenere de te per liberum servitium: pur ceo que *nul franke home portera cest briefe*.' This point seems to have been doubtful down to the time of Sir Matthew Hale (F. N. B., 11 M, and note).

However that may be, the use of the word *manerium* in this last form does not materially detract from the importance of the circumstance that in the other writs the fact which is treated as the basis of the jurisdiction appealed to is the relationship of lord and vassal, and not the existence of a manor.

This appears more strikingly in the form of the writ of dower:—'Rex A. salutem. Praecipimus tibi quod sine dilatione *plenum rectum teneas* B. quae fuit uxor C. de tertia parte decem acrarum terrae cum pertinentiis in W. quam clamat tenere de te in dotem per liberum servitium tertiae partis unius denarii per annum pro omni servitio, quam, etc. ei deforciat' (Registr. fo. 3).

To which a note is prefixed: 'Breve de recto de dote semper

dirigitur heredi viri vel ejus custodi, nisi sit *propter paupertatem heredis qui non habet curiam.*'

Here is a tenure, created by the death of the intestate, and therefore incapable of relying on any immemorial custom, nevertheless assumed to involve jurisdiction. Moreover, the reason given for the want of a court, viz. merely the poverty of the heir, bears strongly in the same direction. The antiquity of the form is proved by its being substantially the same as those given by Glanville and Bracton.

It would seem that the particular form of poverty on the part of the heir which would have this effect on his jurisdiction, would be not the want of tenants, but the want of land in demesne whereon to hold a court. This appears from F. N. B., 5 B: 'And although that this clause, viz. because B. the chief lord, etc., be put in the writ, if the lord have not any court to hold, *because it is a seigniory in gross, and not any demesne land to hold a court*, etc., then although the lord did never remit his court,' and so forth. Also 'if the husband make a lease of *all* his lands unto a stranger for life, and dieth, and the feme is to bring a writ of right of dower against the lessee for life; then it seemeth reasonable that the feme have her writ of right of dower against the lessee for life in the common pleas, because that he in the reversion hath not any court.'

This therefore is the explanation of a passage (F. N. B., 3 C) which might otherwise be of greater importance: 'Also it seemeth to stand with reason, that if a man hold of any lord as of a seigniory in gross, which is not any manor, for which seigniory he cannot keep any court; that then the tenant ought to sue such writ as before in the king's court, and that the lord shall not have action, or other means to annul this act, because he hath not any court to hold plea for that there.'

One cannot help thinking that the expressions 'it seemeth reasonable,' 'it seemeth to stand with reason,' introduce a lawyer's gloss, and not an established part of well-known law.

We have an incidental illustration of the same idea in Lord Coke's commentary on the chapter of Magna Charta already cited (cap. 24: 'Breve quod vocatur praecipe . . . unde liber homo perdat curiam suam') where speaking of the remedy of the lord, he says: 'The lord may have in that case his action against the tenant, and his petition of right to the king, to be restored *to his seigniorie*,' whereas the statute says '*curiam* suam.' The lord had lost the one in losing the other; and it does not occur to Lord Coke that this needs to be stated (2 Inst. 39). The fact is that the lord lost both the one and the other by the estoppel of the writ, 'which supposeth the lands to be holden of the king' (F. N. B., 3 D).

Professor Maitland's investigations into the early manorial rolls of this country have led him to the provisional conclusion that so much of our manorial jurisdiction as is represented by the court baron is of purely feudal origin. It can hardly be doubted that he is right; and that the court baron is only accidentally connected with the leet and the customary court for the copyholders. Indeed, if the feudal ideal can be shown to have been actively influential down to the thirteenth or fourteenth century, it would seem certain that the customary court, where the 'pares' were *not* the judges, cannot have been of feudal origin; and it would be probable, that it did not arise till the decay of the feudal idea. This would accord with the conclusions of a learned correspondent, Mr. T. F. Kirby, of Winchester College, who thinks that the customary court was something like the meetings of tenants which are at the present day held by the agent of any large estate. As long as the copyholds were really held at will, the customary court must have been of this nature, so far as its transactions related to the holdings. Mr. Seebohm's conclusion that the manor was an estate with a village community in serfdom upon it (English Village Community, pp. 126–7) accords with this theory of the customary court, but seems to disregard both the existence and the necessity for the existence of freeholding tenants. Professor Maitland throws doubt upon the 'tenure at will,' but one cannot help thinking that the legal theory must have had an origin in actual fact.

Another question of general historical interest would be incidentally affected, by attributing more force and importance to the feudal idea of seigneurial jurisdiction. It would be more difficult to believe that William the Conqueror exacted homage as well as fealty from freeholders who were not his own immediate tenants[1]. If however he really did so, it must be admitted that that fact makes against the suggestions of this paper. And Bishop Stubbs thinks that he did.

G. H. Blakesley.

[1] As to the effect of homage, see Bracton, 78. Amaury I, King of Jerusalem, made all vassals homagers of the king; but then he also made them all *pares* of one another in rank (Beugnot, *Assises de Jérusalem*, vol. i. Introd. p. xlvi).

ON THE AMENDMENT OF LAW RELATING TO FACTORS.

IN a note inserted in the July number of this REVIEW I directed attention to the Factors Act 1877, of which there is however, notwithstanding the title of the Act, only one section, namely the 2nd section, which deals with the case of Factors. I pointed out that the other sections are very imperfectly framed; for instance, that the 3rd section refers only to the case of a vendor left in the possession of documents of title to goods, whereas there seems no good reason why its provisions should not apply equally to the case of a vendor left in possession of the goods themselves; and I stated several reasons why the section ought to be entirely recast. I further observed that there was no substantial distinction between the cases covered by the 4th and 5th sections, and suggested that there was no necessity for retaining both these sections. I now desire to make some observations on the other Factors Acts. They are three in number,—the Acts of 1823, 1825, and 1842 respectively. These Acts, which constitute successive amendments of the law, are to be read together, and it has required much subtlety of analysis and many judicial decisions to interpret and reconcile the various provisions. Merely to consolidate these enactments without at all altering the existing law would be an almost useless task. It would scarcely make the law more intelligible than it is at present, and it would tend to stereotype its inelegancies, whereas, if a very few unimportant amendments of the law be made, the law relating to Factors can be set forth in a short and simple Act.

I venture, however, to think, that even something more than this should be done. The time seems to have come when the law relating to Factors should be extended and altered, so as to make it more consistent with itself, and better suited to the exigencies of modern commerce and business.

It has been decided that the Factors Acts, 1823, 1825, 1842, according to several decisions, apply only to cases where for the purposes of *sale*, goods are entrusted to an agent, and that they cease to be applicable where the agent's authority is revoked before he disposed of the goods. But the law on this point was altered by the 2nd section of the Factors Act 1877, which provides that the revocation of the agent's authority should not invalidate the title which the agent professes to give. Since this enactment the only general principle on which the statute law relating to Factors can be made to rest is the principle of estoppel. The principle seems to be that if the owner of goods delivers them to a

mercantile agent whose ordinary business is to sell or advance money on the security of goods, he clothes such an agent with apparent authority to sell or pledge them. But if this be the general principle, it logically leads to an extension of the Factors Acts. For how can a person ascertain for what purpose an agent has been entrusted with the goods? it would be as difficult for him to find this out, as it is for him to find out whether or not the agent's authority has been revoked. Whatever may have been usual or practicable in the course of business fifty or sixty years ago, it is certainly impracticable at the present day for a person dealing with a Factor to inquire as to the purpose for which the goods were entrusted to him. The owner has, by delivering the goods to a mercantile agent, who has an apparent authority to dispose of the goods, estopped himself from denying such authority. Therefore both principle and expediency point to the conclusion that the provisions of the Factors Acts should be extended to *all* cases where a person delivers goods to a mercantile agent, whose ordinary business is to sell or to raise money on the security of goods.

There still remains another matter of considerable practical importance:

According to the Factors Acts, a person bonâ fide buying goods of a factor, or advancing money to him on the security of goods, acquires a good title, although he knows that the agent with whom he is dealing is not the owner of the goods. (See the 4th section of the Act of 1825 and the 1st section of the Act of 1842.) In short, he is *not put upon inquiry* as to the agent's authority. But the Factors Acts do not apply to choses in action, and the House of Lords has recently decided in the *Earl of Sheffield* v. *London Joint Stock Bank* (13 App. Cas. 333), that one who advances money to a person on securities, even though they are negotiable, is *put upon inquiry* as to that person's authority, if the latter is known not to be the owner of the securities.

Whether that decision is quite consistent with the rules of law relating to negotiable instruments, it is now of course useless to discuss; but it certainly gives rise to an anomaly which is as striking as it is inconvenient and embarrassing, for it places the title to negotiable instruments on a footing less secure than the title to goods or documents of title. I venture therefore to suggest that the law on this point should be amended, and that the provisions of the Factors Acts should be extended to the case of negotiable instruments left in the hands of mercantile agents whose ordinary business is to sell or obtain advances on the security of such instruments.

ARTHUR COHEN.

COUNTY COURT REFORM.

IT is given to few writers to make a dry subject entertaining, but nobody will deny that the articles on County Courts which have from time to time appeared in this REVIEW from the pen of Judge Chalmers are dressed up in an extremely interesting form, and they certainly command attention. The difficulties surrounding the County Court system are not easy to solve. Opinions have been occasionally expressed by the Bench, more or less frequently by the Bar, and now and again by solicitors, but few have enlisted lasting notice, principally because the writers have not had sufficient opportunities of making themselves acquainted with the all-round position. Knowledge incident to mere practice in the Courts is incomplete, it being necessary to dovetail the views of Judges, Registrars, and other officials to thoroughly test the situation. It is hardly less important to try and meet fairly the great bulk of the solicitors who, as Judge Chalmers states, 'will not go into the County Court if they can help it,' and whose antipathies must in some measure be considered if it is desired to continue enlarging the jurisdiction of the Courts and to make them work smoothly.

I hardly know whether I should have again entered into a discussion on this subject but for the fact that Judge Chalmers in his January article quotes my communication to *The Times*, wherein I suggested that the existing Metropolitan Courts would not be able to cope with the new work cast upon them by the 1888 Act relieving the High Court of most ordinary Contract Trials up to £100. It is true, as stated, that my published letters were based on the exceptional experience derived while taking a very active part as Honorary Secretary of the Special Committee appointed by the Law Society to consider the practice and procedure in County Courts—such Committee with some intervals sitting for several years. I had frequent opportunities of conferring with Judges, Registrars, and leading practitioners, and I soon discovered that unusual allowance had to be made for the point of view from which they respectively approached the matter. A Judge writes and speaks as a Judge, and one of the disadvantages under which a County Court Judge labours is that he is not elevated from the Bar while engaged in the actual practice of County Court work, nor has he in a general way had occasion to exhaustively consider the practice he is called upon to administer, indeed in nine cases out of ten he has scarcely ever been inside a County Court at all. I readily see that this cannot be helped, but the fact remains. He does not always readily grasp the needs of the County Court Bar, and much less of the solicitor prac-

titioner, with whose share in the practice he is mostly entirely unfamiliar. As a general rule there is little or no concerted action between the County Court Bench and the County Court advocate, and the wants and wishes of the other do not get ventilated as in the Superior Courts.

As regards the Bar themselves, I am unaware that any barrister of note with actual experience of County Court practice has given to the world any well thought out essay on the system. I am far from suggesting that the many known authors of works on County Court practice are not entitled to the reputation they have attained so far as their books go, but to compile a work on practice as it is, is a wholly different matter to writing a dissertation on the practice as it ought to be, in other words to examining the defects and suggesting amendments. The solicitors who have tried their hand at County Court manuals have been very sparing of suggestions, and it is no disrespect to say that these treatises have been mostly written by writers who have become enamoured with the system from the accidental circumstance that they have been thrown amongst County Court work and have been content to accept the Court as an institution requiring no explanation beyond the fact that it exists.

Having thus glanced at the writers on the County Court, it seems desirable to say a word on those who have taken the leading share in legislating upon it. A few weeks ago the learned Master of the Rolls, speaking of the cardinal amending section of the 1888 Act—that is to say, the clause transferring Contract actions up to £100 from the High Court to the County Court—made the scathing observation that while a plaintiff was compelled to initiate ordinary Contract actions over £50 in the High Court, the latter Court was equally compelled to turn over the case to the County Court immediately it was found to be contested! I do not know to whom in particular the drafting of the unfortunate section is due, but the point is immaterial, for the real responsibility rests with those law reformers who resolved, *coûte que coûte*, not to let a much-needed consolidating measure pass without thrusting some new jurisdiction and extra work on the County Court, neglecting entirely to consider whether it could bear the burden or whether the machinery ought not to be first materially improved, the main purpose apparently being to crush the efforts of those who were asserting that the High Courts were insufficiently manned.

The reforming party were well aware that statistics showed that even under the transfer clauses of the prior County Court Acts no less than thirty per cent. of the actions annually commenced in the High Court not the subject of default judgments were turned over to the County Court. Every practitioner knew

that only about two thousand Nisi Prisi trials (including circuits) were got through during the year, while it was equally common knowledge that nearly half as many again would have fallen upon the High Court but for the nine hundred orders known to have been made transferring cases to the County Court where the writ claimed between £20 and £50, or under other sections permitting transfers. It seemed a fine chance therefore for a further and wholesale removal of Contract cases up to £100, the proportion of the Nisi Prius trials under that amount being very great, and also Tort cases under £20 now practically thrown into the County Court, affecting altogether a good half of the existing High Court disputed cases transferable at the mere will of either litigant. As the Master of the Rolls said, plaintiffs anxious and willing to try admittedly disputed questions in the County Court have to start life in the High Court whether they like it or not, and then with or without the consent of the adversary remove the case to the County Court.

There was a consistency in the prior legislation which permitted the turning over of under £50 Contract cases from the High Court to the County Court, the plaintiff having had the option of going there in the first instance within that limit. Such transfer was a sort of rebuke, as before issue joined the right to apply was given to the defendant only, and as regards applications to remit cases after issue joined open to either party, if the summons were at the instance of the defendant, he had to establish to the satisfaction of a Judge that the nature of the case was such as to warrant his exercising discretion, in other words, to say practically that the plaintiff wrongly brought his case in the High Court. But observe the difference in the new legislation. There is now no distinction between cases before and after issue joined, the right to apply being given to either party, and the previous partial discretion of the Judge absolutely taken away. In practice the outcome of the new section will be to throw the bulk of the £100 trials into the County Court.

The experienced practitioner is able to read between the lines and see the real reason for this strange 65th clause. It has already been remarked that in the majority of cases where the High Court and County Court have concurrent jurisdiction the solicitor avails himself of the former tribunal. There is a special reason for this quite outside the arguments already adverted to. We all know that in former days the Legislature had such a tender regard for debtors that so far from checking delay they actually invited it by compelling the plaintiff to enter a sham appearance for the defendant if he failed to do so himself. But while all this is changed in the High Court, delays are still flagrant in the County Court. In the superior tribunal sham defences of

all kinds are nearly shut out, appearances to all specially endorsed writs being daily set aside unless backed up by the defendant's oath, and mere denials and other purely dilatory pleadings are things of the past. Although the County Courts have by degrees been raised to a position bordering on a branch of the High Court, so much so that I once read a paper at a Law Congress advocating amalgamation, the bulk of the machinery in the lower tribunal has been left unreformed. The superior work cast upon the Court is mostly conducted upon lines very suitable to its infancy, when the jurisdiction was limited to trifling sums and the whole business was associated with and regulated for litigants in person.

In the County Court there is no equivalent to High Court order 14, and a defendant has the greatest facility to defy the plaintiff under what are known as default summonses, although these have to be preceded by the plaintiff's oath. Every practitioner is aware that the intended speedy effect has become nearly a dead letter, and the common process is often found to be the quicker method of bringing a defendant to book. Judge Chalmers remarks in his January article, moderating somewhat his previous essay in which he spoke more encouragingly of order 14, that the circumstance that County Court Judges have to travel about practically precludes provision being made for the desired relief (except in a few districts), easy and speedy access to the Judge being essential. I submit that this question of machinery ought to have been considered prior to extending the jurisdiction, and that it is an unsatisfactory answer to say that a remedy admittedly good cannot be effectually given for want of appliances. The Law Society's County Court Special Committee debated this point at great length, and the Council urged the authorities to make provision for High Court order 14 being applied. This recommendation was not only ignored, but the leading spirits of the grand Committee were, as I have said, so resolved to relieve the High Court of trials under £100 that they adopted the half-and-half measure allowing every plaintiff to bring his action in the High Court solely for the purpose of affording the opportunity of putting order 14 into force. In the early stages of the Bill the plaintiff was expressly allowed a certain number of days for this purpose, but the words were afterwards removed, I presume on the authority of *Miers* v. *Gardner*, 28 Sol. Journal 495, deciding that a pending application for judgment under order 14 was good cause for refusing an application to remit. This really accounts for the anomalous section compelling a litigant to have a preliminary skirmish in the High Court as to actions under £100, simply because no suitable machinery exists in the lower tribunal for securing speedy justice.

The Law Society saw these things clearly enough, and their recommendations would have covered most of the ground. Their idea was, that if the summons process in the County Court were assimilated to the plain and intelligible form of writ adopted in the High Court, and order 14 were introduced in respect of liquidated demands over £10, and if too the work were classified so as to separate the important and trifling cases, with special provision for the trial of the latter unless either party objected (quite a different thing to both parties consenting), an original concurrent, but not exclusive, jurisdiction up to £100 might be safely given. At a later stage indeed the Council went so far as to recommend that a plaintiff should be allowed to go to the County Court for any sum, however large, the defendant, where dispute exceeding £50, having a right to apply to remit the case to the High Court. These recommendations, if carried out, would at all events have worked a great improvement, whereas we are now in worse confusion than before.

It is said that the defects of the 1888 Act are to be cured in 1889 by an amending Bill, but nothing has been heard of such a measure in the Houses of Parliament, and the snail-like pace at which previous County Court reform has progressed is extremely discouraging. So far back as 1878 a Committee of both Houses of Parliament sat to hear evidence on the needful reforms. Lord Bramwell took a prominent part, and it was he who first strongly recommended that as County Courts were already entrusted with such extended jurisdiction it would be better once for all to give a plaintiff unlimited power to initiate proceedings there, subject to transfer by defendant in proper cases. Lord Bramwell also approved of increasing the salaries of the Judges in large districts, and most solicitors agree with him. Here, however, the Treasury steps in. I am one of those who think that real County Court reform has been more retarded by Treasury considerations than by all outside opposition put together. The scandalously high fees taken from the litigant, whether he employs a solicitor or not, is in many cases prohibitive. If it be urged that County Courts must be self-supporting—a very vexed question—the receipts must come from the machine work, not the hearings before the Judge, and more moderate fees (on the principle of small profits and quick returns) would, I think, speedily augment such receipts.

It has been rightly pointed out that the solicitor and not the litigant chooses the tribunal in ninety-nine cases out of every hundred, and it is not to be reasonably doubted that if the machinery of the County Court were made to keep pace with the larger jurisdiction conferred, and a just and proportionate scale of professional remuneration were accorded, the solicitor would willingly avail

himself of the so-called inferior tribunals; not that in these railway times there is much force in the old cry about bringing justice to every man's door, and I concur with Judge Chalmers that many Courts might be usefully merged into centres, especially looking to real or imputed local influence associated with very small places.

The recommendations of the 1878 Committee were entirely shelved, and it was not until 1886 that even a consolidation Bill was pressed forward, with an announcement that an amending Bill would follow. The 1886 measure was subsequently dropped, and matters dragged on till 1888, when the Lord Chancellor expressed a determined intention to consolidate, and he succeeded, but unhappily it was at the fag end of the session; and to avoid losing the consolidation clauses, he was obliged to sanction confusing amendments without a debate thereon by the Law Lords, who would have soon exposed the unwisdom of what had been done. Nothing short of a fresh Parliamentary Committee, with adequate outside assistance consisting of the present County Court Rule Judges (five admittedly front rank men), with a due proportion of Barristers and Solicitors, also Registrars and High Bailiffs and other people who have practically studied the problem, will be able to tackle the position.

As regards County Court business in the metropolis, it is anticipated that the remitted cases will alone be enough to keep an extra central Court going (certain Judges, if not an extra Judge, being told off in rotation to preside); and it is obvious that if London solicitors as a body are to get a favourable impression of the Courts some facility must be offered for carrying out administrative work. On this particular point the following notice of motion stands in my name for the next meeting of the Incorporated Law Society:—'That, looking to the volume of substantial work now thrown into the scattered London County Courts, this meeting is of opinion that a Central Metropolitan Issuing Office is immediately called for, and that in the interest alike of the junior Bar, Solicitors and Suitors, all remitted town cases should be grouped and tried in some building adjacent to the Royal Courts of Justice.' I have already mentioned that a few years ago I read a paper at the annual Law Congress advocating positive fusion of the superior and inferior Courts, a question which must, I venture to think, come to the front when the public and the profession have to give their serious attention to a really comprehensive and sweeping measure of County Court reform.

FRANCIS K. MUNTON.

DEFINITION OF CIRCUMVENTION[1].

Fraud Reconsidered.

IT was asserted in the chapter on Definition of Fraud that the law of fraud consists of two branches, deception and circumvention[2]; it was said that deception is here to be understood as implying some present transaction between the party deceiving and the party deceived, and thus touches the motives to the action of the latter; that in circumvention, as the term is used by the writer, there is no present transaction between the two parties, so that the fraud does not touch the motives of the party defrauded. It was also shown that a substantial distinction in law separates the two branches of the subject, in that deception regularly leads to an action for damages, though not to that alone, while circumvention purely does not lead to such an action except in very peculiar cases[3]. The subject of deception has been examined accordingly; circumvention remains to be considered.

Before proceeding, however, with the new subject, attention should be recalled to the essential fact that fraud, in the proper sense, or at least in the sense in which the term, when it is needful to speak precisely, is here used, should be understood as involving guilt[4]. Now it should be observed that this does not imply a standard based upon individual morality, any more than does 'guilty' in trespass, though true it is that moral guilt is oftener present in fraud than in trespass. The true standard by which to determine of the existence of guilt is to be found in the common conscience; that is, in the conscience, and so in the judgment, of an ideal person, who in the language of the new photography may be called the 'composite' man, who in the law is commonly called the 'average' man. When the common conscience would repudiate conduct, apart perhaps from mere breach of contract, there is guilt; it matters not that the offender may have intended no wrong, and so may

[1] The following pages will appear as the first chapter of vol. 2 of the writer's work on Fraud. It has not been thought important to change the language to the language of an ordinary article. The chapter may be considered as a sequel to 'Definition of Fraud,' printed in the Law Quarterly Review for October, 1887, and afterwards as the first chapter in vol. 1 of the same work on Fraud.

[2] Law Quarterly Review, and Fraud, vol. 1, *ut supra*. See definition *infra*, p. 147.

[3] Vol. 1, p. 18, and note. Circumvention *with* deception may lead to a suit for damages. Ib.

[4] Vol. 1, p. 4. This was omitted in the Law Quarterly Review paper, and not dwelt upon in vol. 1 as it ought to have been. It is important therefore to reconsider the general subject of fraud, shortly, with a view to this point.

have a clear conscience. If on the facts the average man would have intended wrong, that is enough.

This conception of fraud (which, since it is not the writer's, may here be spoken of without diffidence), if steadily kept in view, will do away with much of the prevalent confusion in regard to moral fraud; a confusion which, to mention a single case, causes lawyers so often to seek refuge behind such convenient but ineffective language as 'fraud upon the law'[1]. What is fraud upon the law? Fraud can be committed only against a being capable of rights; and 'fraud upon the law' is likely to darken counsel. What is really aimed at by this contrast between moral fraud and fraud upon the law is a contrast between fraud in the individual's intention to commit the wrong and fraud in the judgment of the average man.

There are to be found occasionally, it is true, clear aberrations from this standard; indeed, while its existence has perhaps always been recognised in a general way in modern times, the real significance of the standard has but recently been brought out in clearness[2]. The test applied by some courts, of the defendant's actual knowledge of the falsity of a misrepresentation made by him, in certain actions for deceit[3], is an example of the missing of the standard; but this test has recently been rejected, upon great consideration, by the Court of Appeal, and the test of want of reasonable ground for belief adopted[4]. Another case of apparent, but perhaps not real, departure from the standard, falling under the head of circumvention, may be mentioned, namely, where statute, or it may be the common law, has for special reasons fixed some individual or particular test, instead of the general standard; as where the effect of a payment by an insolvent debtor to one of his creditors, to the detriment of the rest, is made to turn upon the debtor's 'view' to giving a preference[5]. The implication is plain enough; if the payment was made without a view of preferring the creditor, it is valid[6]. But would it not be within the statute if made under circumstances which would show that the average

[1] The term is good enough of course when used with clear understanding. As to the term, see Fraud, vol. 1, p. 7.

[2] The credit of leading in the right direction belongs to Mr. (now Mr. Justice) Holmes, in his Lectures on the Common Law. *Peek* v. *Derry*, *infra*, is a strong following in regard to cases of deceit.

[3] *Carroll* v. *Hayward*, 124 Mass. 120; *Salisbury* v. *Howe*, 87 N. Y. 128.

[4] *Peek* v. *Derry*, 37 Ch. Div. 541. See also *Cann* v. *Willson*, 39 Ch. D. 39. The tendency is towards obscuring the boundary between fraud and negligence. Perhaps that may make some trouble; but more good than harm is likely to come of it. One of the results will be to enable a person, in some cases, to sue either for negligence or for deceit. The case of *George* v. *Skivington*, L. R. 5 Ex. 1, readily comes to mind. The step is another remove from the thraldom of forms of action.

[5] Bankruptcy Act, 1883, § 48; *Ex parte Taylor*, 18 Q. B. Div. 295.

[6] *Ex parte Taylor*, *supra*; *Ex parte Hill*, 23 Ch. Div. 695.

man would have had such a view, though the particular debtor may not have had anything of the kind,—by 'circumstances' being meant something besides the mere fact that a preference results? That is, would not such circumstances be more than evidence of the debtor's purpose?—would they not show, as matter of law, a view to preference[1]?

Whatever the true view of special cases, there is little question that the general standard must be applied to the second branch of fraud as well as to the first. That conduct then amounts to fraudulent circumvention which would be fraudulent in the average man. We have spoken of 'fraudulent' circumvention, for indeed there may be circumvention which is not fraudulent, just as there may be misrepresentation which is not fraudulent; and this in more than one way. A policeman may circumvent a rogue, a detective may circumvent the plottings of anarchists, a general may circumvent the enemy, without being guilty of fraud; this is why the Roman law so often speaks of 'dolus malus' instead of 'dolus' merely[2]. There is another way in which there may be circumvention, in a sense, without fraud; and that more to the present purpose. An act may work the effect of intended circumvention, and for that reason be actually treated, for some purposes, as unlawful. A man supposing himself to be solvent may make a gift of his property under circumstances which to the average man at the time would justify the act; but if he was in fact insolvent, the gift will be unlawful towards his creditors.

Acts like the one just mentioned are sometimes spoken of as fraudulent; they are often discussed in connexion with the general law of fraud upon creditors, and rightly enough. But in reality such an act is only unlawful; it is called fraudulent only because it is associated with other acts that really are fraudulent, and it is unnecessary in ordinary cases to make any distinction. To be

[1] 'If persons will take from a man who is in difficulties a deed .... which has the effect of withdrawing, and is intended to withdraw, all the property of the debtor from the legal process which his creditors have a right to enforce against him, and bankruptcy ensues, the deed is void under the bankruptcy law. It is fraudulent as well as void, whatever may have been the view of those who were engaged in the transaction....' Cotton, L.J. in *Ex parte Chapin*, 26 Ch. Div. 319, 331.

It may by some be thought doubtful—Lord Ellenborough, in *Crosby* v. *Crouch*, 2 Camp. 165, 168, called the doctrine of preference an excrescence—whether preference can in any ordinary case be regarded as a true example of fraud; but the doubt would appear to have little foundation. For reduced to its lowest terms, the case comes to this: An insolvent debtor, knowing his insolvency, turns over to and for creditor *A* the part of his estate to which he knows creditor *B* is entitled. Now that part, morally speaking at all events, the insolvent holds, as he knows, in trust for *B*; can then his turning it over to another be anything short of fraud, according to the common conscience? Would not the average man say that a (virtual) trustee who, knowing what he was doing, should give the trust property to a creditor of his, instead of handing it over to the *cestui que trust*, was guilty of fraud?

[2] Dig. 4, 3, 1, 2. It is plain that such cases may be cases of pure circumvention, i.e. without deception.

accurate, to deal with the subject of fraud in the light of the common conscience, such an act should be termed unlawful; or if the word 'fraudulent' is used, it must be understood in the sense of 'constructively fraudulent.' An act does not involve guilt merely because it is unlawful[1].

It may not always be necessary to observe this distinction; but the distinction is real in morals, and it is apprehended that it is not merely academic in its application to law. Could a person be punished for 'fraud' in such a case as that last mentioned, under a statute providing pains or penalties against the maker of a fraudulent conveyance[2]? There is solid ground for a legal distinction between the case of a man who does an act which the common conscience would repudiate as a fraud, and one which it would regard as only invalid because, e. g. contrary to public policy. Terms are often deceptive, and their use must be narrowly scrutinized so that the substance of things concealed by them may be regarded.

A remark may here be made in regard to the general definition of fraud already referred to[3]. The law has a dictionary of its own; it may declare an act to be a fraud, or it may, as in the Bankruptcy Act, 1883, declare that an act shall 'be deemed fraudulent'[4], which perhaps might not be deemed fraudulent in the common understanding of the word. And the law may and does amend the meaning of its terms from time to time, as occasion requires, still clinging, and in most cases rightly clinging, to them, however greatly their meaning may have been changed, rather than adopt new ones or simply drop the old ones; the term fraud itself, which has veered in meaning from the extreme of personal dishonor almost, if not all the way, around to negligence, affording ample illustration[5]. It matters not; there will still be a clear distinction in law as well as in morals between cases in which there is guilt according to the common conscience and cases in which there is not. Cases of the latter kind may be declared

[1] The term 'wrongful,' when used, will now be understood to express the idea of guilt.

[2] See 13 Eliz. c. 5, § 3; 27 Eliz. c. 4, § 3; also the modern statutes concerning fraud on the part of debtors. *Hoyt* v. *Godfrey*, 88 N. Y. 669.

[3] *Infra*, p. 147. [4] § 48.

[5] In *Peek* v. *Derry*, 37 Ch. Div. 541, the English courts appear to have nearly reached the point of dropping the word 'fraud' as a term of actions for deceit. But there is still every occasion to use it (and indeed to speak, though with some caution, of intent to defraud, as a ground of substantive redress as distinguished from mere relief), on the footing of fraud as involving guilt according to the common conscience. The haziness of the notion of moral fraud (as an element of the action for deceit) arises often, it is believed, from confusing actual belief and the belief of the reasonable or average man. If the reasonable man could not have believed what he was saying, there is so far true fraud. 'Negligence' does not fit the case so well; indeed, it has not been proposed. But the line is not very clear. *Supra*, p. 141, note 4.

fraudulent for some purposes; the same thing as cases of guilt they cannot be[1].

It is now time to put an end to all digression, and face the question what constitutes circumvention; and yet one may well hesitate before attempting to define a term for the definition of which the law has not brought the materials more closely together than it has for this one. Of deception (the first branch of fraud), though it cannot be said that that has ever entered into the received nomenclature of the law, the state of the law enables one to form a very clear conception[2]; of circumvention, as a whole, the same can be affirmed only with caution. Particular definitions may be given with considerable confidence; no general one can be more than tentative. And it is not to be forgotten that circumvention must cover what of fraud deception does not cover, if fraud itself has been rightly defined.

The true way of reaching a general definition, to be based upon the actual state of the law, is to proceed, where there is doubt, from the particular and known. Taking then the ordinary manifestations, severally, of circumvention, to wit, fraudulent transfers of property, fraudulent payments to creditors, and the like, and schemes in general for evading the law, the following is proposed: Circumvention consists (1) in *A*'s disposing of his property or money, or yielding of his rights, in favour of *B*, with intent to hinder, delay, or defraud *C*, *C* being here a creditor of or purchaser from *A*; (2) in *A*'s wrongful (i.e. unlawful and guilty) disposing of his property or money, or yielding of his rights, in favor of *B*, a creditor of *A*, so as to make the claim of *B* to the benefit thereof apparently superior to the just claim of *C*, also a creditor of *A*, to part of such benefit; (3) in *A*'s wrongfully evading process of the law in favor of *C*; (4) in *A*'s wrongfully evading the law in any other way,

[1] There will no doubt be distinctions too between different cases of real fraud within the definition and explanation; the criminal law may well take notice of the difference between a case of fraud without any actual intention to commit the wrong (that is, where the fraud was such only according to the common conscience), and a case of fraud committed with intent to defraud. Of a recent transaction Lord Justice Cotton, making use of familiar language, says: 'It is what is called a fraud upon the bankruptcy law. I do not for one moment suggest that any fraud was intended . . .; but it is a thing not allowed by the general policy of the law to attempt to avoid the provisions of the Bankruptcy Act, and in that sense it is a fraud upon the bankruptcy law. The clause [in a conveyance under consideration] is a fraud upon the bankruptcy law, or an evasion of the bankruptcy law.' *Ex parte Jackson*, 14 Ch. Div. 725, 741. See *Siebert* v. *Spooner*, 1 M. & W. 714, 718; *Woodhouse* v. *Murray*, L. R. 2 Q. B. 634, 638; *Ex parte Foxley*, L. R. 3 Ch. 515. Such a case may or may not be a true fraud (by the common conscience) according to circumstances; if the party knew or had reason to know the real situation, the act would in principle be a true fraud; if he did not, it would only be unlawful. And there may not have been any actual intent to commit fraud in the first any more than in the second case.

[2] See the definition *infra*, p. 147.

against the rights of *C*, in a matter in which *C* is not a party[1]. Remarks: 'Creditor' in (1) is used, not in strict technical sense, but in the wider sense of one having a legal or equitable demand; 'disposing' is intended to include all active means of transferring rights, and 'yielding' all passive means, in the way of circumvention; 'property' is used in the widest sense; and 'process' is meant to embrace all steps which the law may authorize for the accomplishment of its objects. The following illustrations may be given of these several phases of the subject:—

1. Of the first one it need only be said that it is the case of fraud under the statutes of Elizabeth, fraud upon creditors or purchasers of the debtor or vendor; though it may be noticed that for one to convey one's property to another with intent to hinder or delay creditors or purchasers is a fraud within what has been said quite as much as to convey with intent to defraud. The only difference is that the latter expression is often used to denote 'moral' fraud.

2. An illustration of the second phase of the subject, preference, generally speaking, shall be given in the language substantially of an eminent judge in stating the case before the Court. There had been a transfer of property by a debtor to one of his creditors by way of payment of a debt. But the debtor and the creditor knew that the debtor was insolvent; and knowing this, and the law also, they agreed to do the very thing which the Legislature had declared to be an act of bankruptcy, but in such a way as to avoid, as they supposed, the debtor's committing such an act. 'I think,' said the learned judge, 'that we ought to hold that such a transaction was a fraudulent transfer[2].' Another illustration: In consideration of a past debt of £240 and a present advance of something less, a trader, insolvent, conveys substantially all his property to a creditor, giving to him the right to seize all after-acquired property of the debtor, though purchased with the money advanced[3].

3. One of the provisions of the twenty-fifth section of the Bankruptcy Act, 1883, may be referred to for an illustration of the third phase of the definition. The statute there provides for the arrest of a debtor, if after a bankruptcy notice or a bankruptcy petition by or against him, there appears probable reason to believe that the

[1] If any one will have it that this last phase of the subject is not definition, because 'in any other way' does not define anything, be it so; it is not intended as definition in strictness, but only as a stepping-stone to one.

[2] Mellish, L.J., in *Ex parte Pearson*, L. R. 8 Ch. 667. 'I think it is open to the plaintiffs,' said Lord Chelmsford, in *Howard* v. *Shrewsbury*, L. R. 2 Ch. 760, 772, 'to show that the transaction, though clothed as a purchase, was of an entirely different description, and that it was only made to assume an appearance to satisfy the letter of the Act of Parliament, while it violated its spirit.'

[3] *Graham* v. *Chapman*, 12 C. B. 85. The debtor gets no real equivalent for what he has made over to one of his creditors to the detriment of the rest. But as to that case see *Lomax* v. *Buxton*, L. R. 6 C. P. 107, 112, 113, 115.

debtor is about to abscond with a view of avoiding payment of the debt, or service of a bankruptcy petition, or appearance to any such petition, or of avoiding examination, or of otherwise avoiding, delaying, or embarrassing bankruptcy proceedings against him. Another illustration from the use of the old writ *ne exeat regno*, or the like statutory process: To avoid process for the payment of alimony decreed in favor of a wife in proceedings for divorce, the husband is about to leave the State, and the wife sues out the writ[1]. Absconding with a view to avoiding service of process, and concealment of property to avoid execution, when these acts are wrongful, so as to have legal consequences, are common illustrations.

4. An illustration of the fourth phase: *A*, a married man domiciled in Massachusetts, goes to Maine, where the divorce laws are different from those of Massachusetts, with a view to obtaining a divorce there for a cause which would not authorize a divorce in Massachusetts; and without remaining in Maine long enough to acquire a legal domicil there, obtains a divorce for such cause in that State, and then returns to the State of his domicil[2]. Again: On pretence of searching for stolen goods, but in reality to find goods to attach, an officer wrongfully breaks open a man's trunk[3].

It will be noticed that the constant factor in the definition, and in all the illustrations of it, is evasion of law[4]. It is believed that this is the radical idea of circumvention, and that if there is any form of fraud which does not contain it, that form will be found to be some kind of deception, as touching motives. Not all evasion of law, however, is fraudulent in any significant legal sense, since sometimes acts of the kind are not followed by any legal consequences; they fall without the notice of the law; they are not unlawful. A man may set up a rum shop just outside the corporate limits of a town in which the sale of liquor is forbidden by law; one may do this, and not be guilty of fraud before the law. The evasion must in itself be wrongful, that is, contrary to law, to be fraudulent, legally speaking, as has been intimated all along. On the other hand, every wrongful evasion of law is conceived to be a fraud, and every such evasion practised against one not a party to the act is fraud by circumvention.

[1] 2 Story, Equity, § 1471. See the Debtors Act, 1869, 32 & 33 Vict. c. 62, § 6.

[2] *Sewall* v. *Sewall*, 122 Mass. 156; *Van Fossen* v. *State*, 37 Ohio St. 317. 'When a person, domiciled in this State, goes, in evasion and fraud of the law of his domicil, into another State, in order to obtain a divorce there for a cause which . . . would not authorize a divorce by our law, it is within the power of the State, by its Courts or its Legislature, to declare or enact that a divorce, so obtained before acquiring a domicil in the other State, is or shall be of no force or effect in this State.' Gray, C.J. in *Sewall* v. *Sewall*, supra.

[3] *Pomroy* v. *Farmlee*, 9 Iowa, 140; vol. 1, p. 6; Law Quarterly Review, iii. pp. 420, 421.

[4] Generally under color of the forms of law; but not always, as see the third phase.

Assuming all this to be correct, the following may now be offered as a general definition of the term in question: Fraudulent circumvention consists in endeavour to alter rights by wrongfully evading the law in a matter in which the person to be wronged is not a party. Remarks: 1. The law may be evaded either by circuitous means, as where *A* conveys his property to *B*, with intent to defraud his creditor *C*, or directly, as when *A* wrongfully conceals his property with like intent. There is then nothing in the literal meaning of the word circumvention. 2. The word 'person' includes all beings capable of rights; citizens, corporations, the State.

Whatever falls under the definition is real fraud; whatever falls short, and yet may for some purposes require to be considered as in the same case, is, properly speaking, constructive fraud, or, to coin a term, constructive circumvention. It will not be practicable, however, to observe this distinction through the present volume, by specific division of the subject; and whether a case of possible fraud in the way of circumvention is actual or constructive must be left to be determined, when necessary, by squaring it with the considerations above set forth, so far as they are accurate.

Let us now, at the risk of a little repetition, have the conclusion of the whole matter of defining fraud: Fraud consists in endeavour to alter rights by deception touching motives, or by circumvention not touching motives. Deception here consists in endeavour to alter rights by creating wrongfully a false impression upon one's mind in a matter to which the one deceived is a party with the wrongdoer[1]. Circumvention here consists in endeavour to alter rights by wrongfully evading the law in a matter in which the person to be wronged is not a party.

And this, bearing in mind that the subject is actual fraud, and that too on its civil side alone[2], leads to the following classification:—

FRAUD.

A. *Deception*[3].

1. By act.

(*a*) Misrepresentation in its various phases.

(*b*) Collusion in various phases, not being circumvention.

[1] There is just a suspicion of danger in speaking of the one deceived as 'a party with the wrongdoer,' or the like, that of conveying the idea of joint wrongdoing. But it is difficult to make the matter better without a circumlocution.

[2] In trying to cut a path through the wilderness, the criminal law of fraud has been left aside. The writer's acquaintance with criminal law is not such as to justify him in laying open that domain. Perhaps another will do it. Meanwhile, however, it is apprehended that bribery is bribery, and embezzlement embezzlement (*et sic de aliis*), and not fraud; or if fraud, then fraud and something else.

It may turn out that deception and circumvention together do not embrace the whole of fraud even on its civil side. If so, very well; it will still have been worth while to show the two great continents of the subject, and to map out their divisions.

[3] Vol. I, pp. 465–640.

2. By omission.
   Silence: Duty to speak.
3. Void transactions (1 and 2 leading to some voidable relation).

B. *Circumvention.*
   (The four phases *supra*, which may be shortly put thus:)
1. Evasion of law under the statutes of Elizabeth.
2. Evasion of law by preference: Bankruptcy laws.
3. Evasion of process.
4. Evasion of law in other ways.

MELVILLE M. BIGELOW.

THE SWISS FEDERAL COURT. II.

II. *Jurisdiction of the Court.*

(1) In *civil cases.*

(1833.) Art. 97. Jurisdiction was given in four cases:—

α. *Disputes between cantons.*

(First recension, Art. 102.) Attempts must be made previously to the commencement of a suit to mediate between the parties by means of an arbitrator chosen from some neutral canton, or in such way as the disputing cantons decide. If this mediation is not successful, the Federal Executive is to refer the matter to the Federal Court.

(In both recensions.) A cantonal government can on behalf of citizens or corporations of the canton call on the Federal Court to protect them against the government of another canton which refuses to recognise or infringes rights guaranteed by the Constitution.

β. *Disputes between the Federal Executive and any canton*, provided the Diet refers the matter to the Federal Court.

γ. *When the Federal Government has had recourse to armed intervention*, but solely (first recension) when the Federal Executive, authorized by the Diet, refers the case to the Federal Court, when cantonal authorities have misused their official powers to infringe the cantonal constitution. In such cases the Federal Court is to restore the constitutional status quo ante, and to secure the injured persons suitable compensation to be paid by the canton and its responsible officials.

(Second recension), when the Federal Executive, authorized by the Diet, refers the case to the Federal Court when the cantonal constitution has been infringed by the authorities of that canton.

δ. *Disputes as to 'Heimatlosigkeit'* (i. e. persons in Switzerland not belonging to any canton or to any foreign state, who by a law of Dec. 3, 1850, were required to settle down in some Gemeinde or parish).

(1848.) Art. 101. Jurisdiction is given in the following cases:—

α. *Disputes which do not touch constitutional matters*, whether inter-cantonal, or between the Confederation and any

canton[1]. In this case the Federal Executive refers the matter to the Federal Court, but if the Federal Executive decides that the case does not fall within the power of the Federal Court, the Federal Legislature is to decide the question finally.

β. Disputes between the Confederation on one side, and corporations or private persons on the other, if the latter are plaintiffs and the suit concerns property of considerable value (fixed by the Federal law of 1849 at 3000 francs).

γ. *Disputes as to 'Heimatlosigkeit.'*

(Art. 102.) The Federal Court is bound to decide on other cases if both parties make application to it, and property of considerable amount (later fixed at 3000 francs) is involved. The parties pay all the costs.

It was enacted by Art. 47 of the Federal law of Jan. 5, 1849 (in virtue of clause 106 of the Constitution), and others, that several additional subjects should be added to the civil jurisdiction of the Federal Court, e. g. suits between foreign plaintiffs and the Confederation, if referred to the Court by the Federal Executive or by the Federal Legislature; assessment of damages in consequence of an offence if the jury for criminal cases have not assessed them; suits against Federal officials regarding matters relating to their official duties, if referred to the Court either by the Federal Executive or by the Federal Legislature. By far the most important of these additional subjects were the dissolution of mixed marriages, and expropriation of land for railways and other public works (and other questions relating to railways), which came to be the main occupation of the Federal Court on its civil side, though scarcely suitable subjects for the Supreme Court of the Confederation.

(1872.) Art. 107. Jurisdiction is given in the following cases:—

α. Suits between the Confederation and any canton.

β. Suits between the Confederation on one side, and corporations or private persons on the other, when the latter are plaintiffs and the suits concern property of a certain value (exact amount to be fixed later by Federal legislation).

γ. Suits between one canton and another.

[1] Blumer (iii. 135) points out that the original phrase was 'politischer Natur,' but that on the second reading in the Diet this was, on the proposal of the drafters of the Constitution, unanimously and without debate replaced by 'staatsrechtlicher Natur.' By this change the jurisdiction of the Court was distinctly cut down when compared with the original draft. In favour of the preliminary reference to the Federal Legislature it was urged during the debates of the Committee of August 16, 1847, that otherwise the Court might greatly extend its jurisdiction and decide on purely political questions, which were the province of the Legislature. This argument prevailed by a large majority against the objection that such reference might entail a very considerable delay or a special session of the Legislature, and that therefore it might be dispensed with (save when there was any dispute as to jurisdiction) if the parties agreed to bring the matter directly before the Court (see *Protokoll* of the Committee, p. 139).

δ. Suits between a canton on one side, and corporations or private persons on the other, if one party applies to the Court, and the suit contains property of a certain value (amount to be fixed later by Federal Legislature).

ε. Disputes as to 'Heimatlosigkeit.'

ζ. Disputes as to rights of citizenship between 'Gemeinden' (parishes or communes) of different cantons [1].

Art. 108. The Federal Court is bound to decide on other cases if both parties make application to it, and property of an amount to be settled later by Federal legislation is involved.

It must be noted that the (1872) recension marks another step in the process of extending the civil jurisdiction of the Court, which began in 1848 and was continued in 1874.

1874. Arts. 110, 111, as in (1872), the value of the property being fixed by the Federal law of 1874 at 3000 francs (Art. 29).

Blumer points out that this civil jurisdiction of the Federal Court is the modern form of the old courts of arbitrators, when an impartial judge was sought by both parties to a suit, and that in cases α–δ the suits must be brought direct before the Federal Court which in these specified matters has *original jurisdiction* only. As regards other matters submitted to the Court voluntarily by the suitors, he points out that these have been largely disagreements between building contractors and railway companies,—a class of cases which is now expressly taken out of the original jurisdiction of the Federal Court by the new law of Obligations passed June 14, 1881, which provides that an appeal may be made to the Federal Court. Dubs complains that this voluntary jurisdiction was used by the great corporations as a means of freeing themselves from the jurisdiction of the cantonal courts, and thus erecting a privileged court for their own benefit. Various special Federal laws (see the enumeration in Federal law of 1874, Arts. 28, 31) have given, however, original jurisdiction to the Federal Court in many matters, e. g. expropriation of lands for railways and other public works (1850), dissolution of mixed marriages (1862), disputes relating to railway companies in general (including compulsory bankruptcies), and disputes which by cantonal constitutions or legislation are to be referred to the Federal Court (though the Court intervenes here only with the approval of the Federal Legislature), or in which both parties appeal to the Federal Court, the object in dispute being at least 3000 francs.

But the Court has not only original but *appellate jurisdiction* in certain civil causes; one of these is mentioned above (par. ε). It was much discussed during the debates on the Federal law of

[1] This new clause was suggested by the Stände Rath and accepted by the National Rath (*Protokoll*, 1871–2, p. 569).

June 27, 1874, how far the permission given by Art. 114 of the Constitution (respecting the powers of determining how best to secure the enforcement in a uniform manner of Federal laws passed hereafter) should be extended. Some wished the Federal Court to have jurisdiction as a *court of cassation*, i.e. to quash judgments depending on a faulty interpretation of the law: others, that it should be a *supreme court of appeal*, reconsidering all the facts of the case and giving a final judgment thereon. A compromise was adopted (Arts. 29–30 of the Federal law of 1874).

'In cases in which cantonal courts are bound to decide in accordance with Federal laws, and in which the dispute turns on an object which is worth at least 3000 francs, or cannot be valued in money, either party may apply to the Federal Court to *carry* the judgment of the supreme cantonal court. By agreement the suitors can carry their case to the Federal Court direct from a cantonal court having original jurisdiction, thus evading the supreme cantonal court. An appeal must be lodged within twenty days of the delivery of the judgment which is appealed. It is provided that the Federal Court has to take the facts as presented by the judgment of the cantonal court, but if in the case of disputed facts which have an essential bearing on the case, the cantonal court has sent in nothing, the Federal Court may order that court to supplement in that point its formal judgment, and may then pronounce the final decision.'

Now, it is clear that it is very important that Federal laws should be interpreted and enforced in a uniform manner throughout the Confederation, and also that, though Art. 29 does not use the word 'appeal,' it practically confers, in the specified civil cases, an appellate jurisdiction on the Federal Court. This provision is therefore severely attacked by Dubs, who points out that its effect is to give the supreme court a very large appellate jurisdiction in civil matters (generally all cases in which more than 3000 francs are involved), which is being rapidly extended as Federal laws are passed on one or other important department of civil life. His most cogent argument is, that the Federal Court ought to be, as far as possible, limited to the interpretation of the Constitution, for which purpose it is best fitted, as it is absurd to appeal in civil cases from the courts of one state (the cantons) to the court of another (the Confederation). Orelli, too, is much opposed to this appellate jurisdiction of the Federal Court. Blumer, on the other hand, criticises with great reason the attempt to tie down the Federal Court to the law of the case by compelling it to accept the facts as stated in the judgment of the cantonal court. This confers enormous powers of obstruction or even perversion of justice on the latter court,

while the additional labour devolved on the Federal Court by the examination of the facts of the case would be comparatively small, and the chance of attaining the desired object—a uniform enforcement and interpretation of the Federal law—far greater. Then, too, it is from the point of view of the cantonal court a less serious encroachment on its jurisdiction to allow the Federal Court to examine the facts for itself than to be compelled to supplement its judgment at the demand of the Federal Court. The Federal Court has held [1] that it is not bound to interpret foreign laws which are involved in a case coming up from a cantonal court; but Blumer thinks that such a decision has unnecessarily limited the jurisdiction of the Federal Court.

Among the chief subjects which fall within this appellate jurisdiction, owing to the passing of Federal laws relating thereto, are obligations (including all subjects connected with moveables and trade), copyright, compensation for injuries sustained in railway accidents, trade marks, dissolution and annulment of marriages (which excites the great ire of Dubs), maintenance of paupers belonging to other cantons, etc.

The Federal Court has, too, a certain *voluntary jurisdiction* in administrative matters, as there is no special Federal court for such matters, e. g. management of the liquidation of railway companies or of banks having the right of issuing notes, or the balance sheets of railway companies.

Thus the Federal Court possesses a considerable original jurisdiction, an appellate jurisdiction which tends to extend rapidly, and a (probably temporary) certain voluntary jurisdiction in purely administrative matters.

Dubs remarks bitterly that the tendency is to limit the jurisdiction of the Court as an interpreter of the Constitution, but to extend it more and more in civil matters. To understand this indignation it must be borne in mind that the passing of Federal laws on civil matters is of very recent date, and is supposed to be aimed at cantonal independence. Hitherto the laws and customs have been very different in each canton, or even in each district within a canton. It was not easy to introduce uniform laws for all parts of the same canton, and far harder when the units are not parishes (Gemeinden) but cantons, and when the devouring monster is of so recent creation as the Federal government. In the revision campaign of 1866 the cry was 'one law and one army,' and in the message of the Federal Executive to the people, dated June 17, 1870, it was pointed out with great force that it is not sufficient to pass uniform laws for all parts of the Confederation, but that they must

[1] Blumer, iii. 159-161.

be enforced and interpreted in a uniform manner, and this by means of the judiciary and not of the executive power. The advance since that date in the civil jurisdiction of the Federal Court has probably been due to that feeling. Undoubtedly it is due to the fact that centralising tendencies are gathering strength, and it is probable that, as the Constitution of 1848 was in this respect a great advance on that of 1815, and 1874 on 1848, so the future Swiss Constitution will be far more 'unitary' and centralised than the one at present in force.

(2) In *criminal causes.*

(1833.) Art. 98. Jurisdiction is given in the following cases:—

α. Members of the Federal Executive, or other Federal officials impeached by the Diet.

β. High treason against the Confederation, revolt against and resistance to Federal authorities.

γ. Crimes against international law (in the first recension, against the relations of Switzerland to foreign States).

δ. Crimes of soldiers in time of war or of armed neutrality[1], in so far as such offences shall by the future military penal code be expressly assigned to the Federal Court.

ε. (First recension.) Offences committed during disturbances which have brought about Federal intervention, provided that the Diet, on the proposition of the Federal Executive, considers that an amnesty cannot be granted, and that the cases should in the interests of law and public order be withdrawn from the cognizance of the cantonal courts, whether as regards the preliminary enquiry or the final decision.

(Second recension.) Political crimes which are the cause or result of disturbances which have brought about Federal intervention, provided that the accused persons demand to be brought before the Federal Court; in such cases the Court will enforce the criminal code of the canton where the crimes have been committed.

The Diet may, in the name of the Confederation, grant an amnesty for all such offences. If it issues none, the authorities of the canton where the crimes were committed have under all circumstances the right of granting an amnesty to the authors of such disturbances, and of pardoning those who have been condemned by the Federal Court.

[1] This phrase was altered in the second recension to 'Crimes of soldiers in case of the calling out of the federal troops.'

(The extreme minuteness of clause ε is due to the great disturbances in 1832 and 1833 in Basel and Schwyz, which resulted in permanently cutting the former canton into two bits, and the latter for a time.)

1848. Arts. 94, 103-4. Juries are to be employed in criminal causes in order to decide on the facts. The details are left to Federal legislation, but the following cases are specified :—

α. Federal officials handed over to the Federal Court by the Federal authority which named them.

β. High treason against the Confederation, revolt against and resistance to Federal authorities.

γ. Crimes and offences against international law [1].

δ. Political offences, the cause or result of disturbances which have brought about Federal intervention [2].

The Federal Legislature may, in any of these cases, grant an amnesty or pardon [3].

Power was given to the Federal Legislature to define this criminal jurisdiction, to regulate the formation of assizes and a 'court of cassation,' method of indictment, etc. [4]

(1872.) Arts. 103, 109. As 1848 (save last empowering clause) making clause α, clause δ. The provision as to amnesty and pardon is contained in 81 (7).

1874. Arts. 106, 112. As 1872. The amnesty and pardon clause is in 85 (7).

This criminal jurisdiction has been very rarely exercised as yet. In some of the cantons of Western Switzerland the jury system had been introduced before 1848, and it was adopted in the Swiss Federal Constitution of that year by the very large majority of 18 (out of a possible 23) commissioners [5]; and later by the Diet, despite opposition on the grounds that the cost of bringing jurors together would be considerable; that it was not worth while to give the citizens the trouble of drawing up a list of jurors, as the number of cases would probably be so small; and that in a democracy where the magistrates were elected by the people, the jury was not essential, as in a monarchy, against pressure on the part of the sovereign [6].

[1] The Committee of August 16, 1847, struck out clause δ of (1833), because a special military penal code was to be drawn up (*Protokoll*, p. 140).

[2] The phrase of the second recension of 1833, by which in such cases the cantonal criminal law was to be enforced by the Federal Court, was rejected by the Committee of August 16, 1847 (*Protokoll*, p. 140).

[3] The power of the cantons to grant amnesties was struck out by a large majority of the Committee of August 16, 1847, on the second reading of the draft (*Protokoll*, p. 184).

[4] This clause was adopted by a large majority in the Committee of August 16, 1847, after a sharp debate, turning as was natural on the rights of the cantons, and on the expense of the new system (*Protokoll*, pp. 140-1).

[5] *Protokoll* of the Committee of August 16, 1847, pp. 137-8.

[6] Juries elected by the soldiers are employed in the case of offences against military law (Dubs, ii. 86).

In answer it was urged that so many important departments had been made over to the Confederation (e.g. coinage and customs), that juries might very frequently be needed, while in a democracy the exclusive power of lawyers was nearly as dangerous as that of a king in a monarchy, so that juries were required to give an impartial expression of opinion on the facts. It must be noted that no one objected to the principle of the jury system, the arguments used against its introduction in Switzerland being concerned with its practical working.

The Federal law of June 27, 1874 (Arts. 32–55) contains many provisions regulating the exercise of the criminal jurisdiction, almost, if not quite, identical with those of the Federal law of June 5, 1849 (Arts. 8–14, 22–42, 48–51). The Court is annually divided into three departments, two of them composed of three judges, and having three assistant judges in case of need.

(1) To examine indictments (*Anklage Kammer*).

(2) *Criminal division*, in which twelve jurors assist, chosen for six years by popular vote in five Federal districts, in the proportion of one juror to every 1000 inhabitants (in one case, the Italian district, 500 inhabitants).

This division forms the 'Federal Assizes,' and meets whenever an indictment is sent on by the 'Anklage Kammer.' There are many elaborate provisions as to qualifications, exemptions, and the challenging of jurors; if forty are challenged, the remaining fourteen are summoned to attend. The division determines the place where it will sit. Prisoners during trial are confined in the cantonal prisons.

(3) '*Court of Cassation*' consists of the president, four judges, and three assistant judges, five of whom form a quorum, and each of the three national languages must be represented in it. It decides on petitions from the *criminal division* for review (cassation), revision, or rehabilitation in criminal cases, on complaints against judgments of cantonal courts relating to infringement of Federal laws concerning the Federal Treasury (i.e. as regards the State monopolies of customs, gunpowder, Post Office and telegraphs), bank notes, and insurance. In the case of many other Federal laws such an appeal is *not* permitted[1]. In the case of appeals against the military penal code, in so far as regards decisions of extraordinary courts martial relating to crimes on the part of the Federal general, the chief of the Federal staff, and the commander of an army corps, or division, or brigade, the Federal Court sits as a single body, and seven votes at least are required to quash the decision of such extraordinary courts martial. If the

[1] Blumer, iii. 209–14.

Federal Court decides that the military court has misinterpreted the law, it pronounces judgment according to the proper legal maxims in its place. Otherwise it refers the case to another extraordinary court-martial [1].

A Federal law on the procedure to be followed in criminal cases was passed on August 27, 1851, and a *Penal Code* on February 4, 1853. A criminal prosecution of political offences is only permitted by a special resolution of the Federal Executive. The severest sentence that can be passed is imprisonment for life [2].

As to the *jurisdiction*, Blumer (iii. 205–209) points out that, in virtue of Art. 114 of 1874 (=106 of 1848), other criminal cases have been by Federal legislation handed over to the jurisdiction of the Federal Court.

1. Crimes committed by members of the Federal Legislature either in their official capacity, or alleged against them during the session of the Legislature.

2. Crimes committed against members of the Federal Legislature, Executive, Court, Federal officials generally and jurors while engaged in the exercise of their official functions.

3. *Crimes against Federal property*, if referred to the Court by the Federal Executive, e.g. forgery of Federal documents, injuries to telegraphs, hindering Post Office and telegraph officials in the discharge of their duty. Such crimes are generally tried in the cantonal courts, but under the Federal penal code. No case of the kind has hitherto been referred to the Federal Court.

4. *Crimes against the law as to bank notes*, if referred to the Court by the Federal Executive.

5. Cases of persons accused of several crimes, some falling within cantonal some within Federal jurisdiction, may be tried by the Federal Court, or handed over by it to the cantonal courts.

6. Cases where jurisdiction is given to the Federal Court by cantonal constitutions or legislatures, provided the Federal Legislature consents. No use has hitherto been made of this provision as the cantons set great store by their criminal jurisdiction.

Minor offences against discipline committed by officials of the Federal Executive or of the Federal Court are within the cognizance of whichever of these bodies appointed the offender.

On the whole, the criminal jurisdiction of the Federal Court

[1] Blumer, iii. 214.

[2] Arts. 44 and 50 of the 1874 Constitution taken together forbid the banishment of a Swiss citizen. Art. 65 of the 1874 Constitution, while forbidding corporal punishments, abolished the penalty of death. This article was revised by a popular vote on March 18, 1879 (for revision, 200,485 voters and 15 cantons; against, 181,588 voters and 7 cantons), by which the former punishment was maintained, but the punishment of death was only abolished in the case of non-political offences, thus leaving it free to the cantons to reintroduce it or not as they might think best. Thus the present state of things is that under Art. 54 of the 1848 Constitution. For the subject of this note see Orelli. 73–4.

is not very extensive in theory, while in practice it is almost dormant.

(3) *Interpretation of the Constitution and of State Treaties.*

Dubs holds this to be the principal and natural function of the Federal Court; but we shall see that in this department the distinction between the Executive, Legislative, and judicial powers of government is much blurred by the unwillingness of the rulers to submit all their acts to an impartial revision at the hands of skilled lawyers. It is this branch of the jurisdiction of the Federal Court however which has developed most rapidly.

(1833.) No provisions under this head.

1848. Art. 105. The Court has jurisdiction in cases of the infringement of the rights guaranteed by the Federal Constitution, if such suits are referred to the Federal Court by the Federal Legislature.

This was proposed in the Diet by the representative of Geneva, and carried[1]: though a suggestion that the Confederation should, by means of the Federal Court, protect the guaranteed rights of Swiss citizens as against their cantonal government, received only four votes in the committee which prepared the draft of the Constitution—the indefinite nature of the proposal and the necessity of not weakening cantonal sovereignty being the main objections urged[2].

However this provision was a dead letter, for between 1848 and 1874 *but a single case*[3] was so referred to the Federal Court by the Federal Legislature. The reason assigned for the failure of this clause is that in the debate in the Federal Legislature on the question whether the particular case before it should or should not be referred to the Federal Court, all the facts relating to it were so fully discussed that it was possible to pronounce judgment without further delay.

The practice in cases relating to the infringements of cantonal constitutions, and questions of jurisdiction as between two cantons, etc., came to be, that the Federal Executive pronounced judgment with an appeal to the Federal Legislature. It was founded on two clauses of the 1848 Constitution: viz. Art. 74 (16) and (17[a]), 'The Federal Legislature decides in the case of disputes between cantons which affect constitutional matters, and of questions of jurisdiction between the Confederation and cantons;' and Art. 90 (3),

[1] Blumer, iii. 135.

[2] See *Protokoll* of the Committee of August 16, 1847, pp. 141–2.

[3] Dupré's case, August, 1851; see Ullmer, i. 368. For the text of the judgment pronounced by the Federal Court on July 3, 1852, see *Zeitschrift für Schweizerisches Recht*, vol. ii. (1853), pp. 41–7 of the Rechtspflege und Gesetzgebung Section.

'The Federal Executive has power in the matter of the Federal guarantee of the cantonal constitutions.'

Thus the Executive in the first instance, and the Federal Legislature on appeal, decided questions which were judicial in nature, though having also political bearings. All sorts of party motives came into play, and such scanty legal knowledge was displayed that, according to Dubs (ii. 82), the same member of the House of States (Stände Rath) gave two contradictory decisions in two appeals heard close together and precisely similar, and succeeded in obtaining a majority in favour of each decision. Then, too, the number of these appeals increased very largely, while the Federal Court had but little business. Further, the interference in judicial matters of an administrative authority like the Federal Executive was nearly as evil in its result as that of the Legislature, in which the two Houses might and did sometimes decide differently in the same case. Hence it was proposed as early as 1865 by a committee of the Stände Rath[1] that certain appeals, which by their nature were fitted for consideration by judges skilled in the law, should be by a Federal law specified, and handed over to the Federal Court. A similar system (the Federal Court was to decide in cases of infringement of constitutional rights and of the provisions of concordats, so far as such cases shall by Federal legislation be referred to the Court in which the process is to be summary, in writing and gratuitous) was put forward by the Federal Executive at the time of the proposed revision of the Constitution in June, 1870[2], which was given up owing to the great Franco-German war. Far more sweeping were the proposals of 1872.

(1872.) Art. 110. The Federal Court has jurisdiction in

α. Disputes as to jurisdiction between Federal and cantonal authorities.

β. Disputes between cantons relating to constitutional matters.

γ. Complaints of the infringement of the constitutional rights of citizens, and of private persons in cases of infringement of concordats[3] and State treaties.

Administrative disputes, to be more precisely determined by a Federal law, are reserved.

In all these cases the laws of and decrees binding all citizens issued by the Federal Legislature, and State treaties approved by it, are to be binding on the Federal Court.

By Art. 81 (13), conflicts of jurisdiction between Federal autho-

[1] Blumer, i. 242.

[2] See *Protokoll* of 1871-2, p. 51.

[3] It may be explained that by 'concordats' is meant treaties between different cantons, which create a common practice in certain matters not yet ripe for Federal legislation.

rities were to be decided by the Federal Legislature[1]; and by Art. 99 (3) the Federal Executive (as in 1848, 90 [3]) was to maintain the guarantee of the cantonal constitutions.

1874. Art. 113. As 1872, except that Art. 81 (13) of 1872 is 85 (12) of 1874; and Art. 99 (3) of 1872 is 102 (2) of 1874.

The commission appointed by the National Rath (or Popular House), in their report of April 19, 1871, adopted the proposed clause of June 17, 1870, and so did that appointed by the Stände Rath (or House of States) in its report of May 19, 1871; the latter defining the concordats as 'Federal' ones, and adding 'State treaties with foreign countries[2].' But after the principle (in a wider sense than proposed by the commissioners) of introducing Federal legislation on many points of civil and criminal law (the so-called *Zentralisation*—or *Einheit—des Rechtes*) had (after a debate extending over Dec. 18, 19, and 20) been affirmed by the National Rath on Dec. 20, 1871, by the large majority of 82 to 32[3], the National Rath commission was desired on Jan. 30, 1872[4], to redraft the clause relating to this part of the jurisdiction of the Federal Court. Herr Dubs (whose work I have so often cited) had on the previous day laid before the House his proposals to meet the new state of things,—proposals which went very far beyond those set forth by any of the commissions[5].

On Feb. 5, 1872, the commission reported again to the House on this subject[6]. All the members were agreed that many reasons—the varying political sympathies and the party feelings of the Federal Legislature, the frequent changes among its members, the lack of legal training in the case of many members, the possibility of a difference of opinion between the two Houses, the great lengthening of the sessions by reason of its judicial functions, the non-appearance of the parties in person, and the possibility that one or the other might not know how to find a representative in the Legislature—made it desirable that to a certain extent the Federal Legislature should transfer part of its judicial functions to the Federal Court, though it was not desirable to specify in the Constitution every case that should be so transferred, as that could be better done by means of Federal legislation. They were however agreed as to four classes of cases—constitutional disputes between cantons, disputes as to jurisdiction between Federal and cantonal authorities, infringement of the constitutional rights of

[1] I. e. the two Houses sitting together.

[2] Protokoll über die Verhandlungen des Schweiz. Nationalrathes betreffend Revision der Bundesverfassung, 1871-2 (Bern, 1873), p. 51. The whole volume is most valuable as enabling us to trace the origin of the different provisions of the Constitution.

[3] Ibid., pp. 345-6.

[4] Ibid., p. 476.

[5] Ibid., p. 471.

[6] Ibid., pp. 500-1.

citizens, and the interpretation of Federal concordats and of treaties with foreign States. The commission however was not agreed on the wording of the clause by which the enumeration of other classes of cases was to be left to Federal legislation. The majority wished it to run as follows: 'The Federal Court shall also have jurisdiction in such cases as shall be handed over to it by Federal legislation.' The minority (headed by Herr Dubs) preferred to read, 'The Federal Court has jurisdiction in every case save those in which jurisdiction is expressly taken from it by a Federal law.'

In the discussion on the report[1] in the National Rath, Herr Dubs pointed out that he wished to make the Federal Court supreme in such matters, with certain exceptions in favour of the Federal Legislature, to be specified later by a Federal law: whereas the majority wished to place the Federal Legislature in that supreme position, with reservations in favour of the Federal Court. In support of his view, he laid stress on the desirability of keeping the Legislature and the Judiciary distinct in a State which was beginning to be governed by a centralised system like Switzerland, but in order to prevent the Judiciary from becoming more powerful than the Legislature, he proposed to add a clause providing that Federal laws and treaties with foreign nations which had been approved by the Federal Legislature, were to be binding on the Federal Court. While holding that a judge was more fit to decide legal disputes than a legislator, he disclaimed all wish to adopt the American plan by which the Supreme Court can decide whether any law or resolution of the Federal authorities is or is not in accordance with the Federal Constitution,—a plan which would not work in Switzerland, where many contradictory views were held as to whether certain cantonal laws and foreign treaties agreed with the Constitution or not. Further he pointed out the extreme difficulty of specifying in a Federal law which cases should and which should not be handed over to the Federal Court. Much the simplest plan would be to transfer all cases to the Federal Court, and later pick out those which were to be in the jurisdiction of the administrative authorities. It would be very difficult to go through every case and say to which of the two jurisdictions it should be given; but easy to separate a few, giving all the rest to the Federal Court. It was of all things the one most to be wished for that there should be given to the Federal Court such a position as would enable it to judge impartially in cases of dispute between the Confederation and the cantons.

Herr Heer, in the name of the majority of the commission, said that, while he agreed on many points with what Herr Dubs had

[1] Protokoll über die Verhandlungen des Schweiz. Nationalrathes, etc., p. 501–4.

pointed out, he was of opinion that the division of jurisdictions would be better made by a Federal law than definitely by the Constitution: and remarked that he and his friends, on further consideration, now wished to withdraw from the Federal Court questions relating to the infringement of treaties (as foreign nations would scarcely accept the Federal Court as an impartial tribunal as the nature of the cases was not specified), and to intercantonal disputes as to jurisdiction (as too sweeping a change) in the sense that they would wish these two points placed among the subjects as to which future Federal legislation might, if it was thought desirable, give jurisdiction to the Federal Court.

Herr Dubs, in reply, insisted on the advantage of having some impartial authority to decide on the exact meaning of a treaty, and on the fact that after the Federal Court had given its decision it would have nothing further to do with the matter, the final decision as to whether the judgment of the Court should be adopted or not resting in the hands of the political authorities. He accepted an amendment to alter a phrase of his draft so that in place of stating that the Federal Court had jurisdiction in the four specified points, 'except in so far as Federal legislation may reserve such cases to the jurisdiction of the Federal Executive or of the Federal Legislature,' the provision would run thus: 'All administrative disputes, to be defined by Federal legislation, are reserved.'

When the votes were taken[1], the provision as to administrative disputes was adopted unanimously, the four specified subjects of the jurisdiction of the Federal Court were carried by a majority (the latest proposals of the commission being defeated by a very large majority), as well as a general article permitting reference by Federal legislation of further classes of cases to the Federal Court, and Herr Dubs' provision as to the binding force of Federal laws, general decrees, and treaties.

The Stände Rath later struck out a provision that the process should be summary and gratuitous[2]; and the draft clause thus assumed the shape in which we have given it above, and in which it was submitted to popular vote on May 12, 1872, and was, like the rest of the draft Constitution, rejected.

There had been such a large minority in favour of the draft of 1872 that the idea of revising the Constitution was not given up. The Federal Executive, on July 4, 1873, laid the 1872 scheme (with some slight changes, but retaining the clause the history of which we are tracing) before the two Houses of the Federal Legislature, by whom committees were appointed on July 17. The committee of the

[1] Protokoll über die Verhandlungen des Schweiz. Nationalrathes, etc., p. 505.
[2] p. 172 of the 'Anhang,' or p. 569 of the main body of the *Protokoll*.

Stände Rath accepted without discussion the 1872 clause as to the jurisdiction of the Federal Court in the interpretation of the Constitution[1]. That of the National Rath accepted it after a short debate. In this discussion the dangers of strict legal interpretation of constitutional matters was urged by one side, and it was proposed to make it run as follows:—

'The Federal Court has jurisdiction in boundary disputes between cantons, in complaints regarding the infringement of constitutional rights of citizens, and in complaints of private persons regarding the infringement of concordats and State treaties, so far as such complaints shall not, by Federal legislation, be transferred, as being administrative disputes, to the Federal Executive.'

It was objected to this amendment that it was essential to determine *not* which party ought to win (a political question), but which actually had right on his side (a purely judicial question, to be settled on the basis of ascertained facts and certain legal maxims); and that while a court could settle which party should hereafter enjoy the rights legally his own, a political authority could only decide which party was in the right at the moment of the discussion. It was further urged in favour of the article of 1872 that there was something higher than a mere chance majority, that a court was the only security against arbitrary decisions, that the proposed change did not give to the Federal Court anything like the powers of the American Supreme Court, and that presently the Federal Legislature would be so occupied with passing Federal laws that it would have no time for discharging any judicial functions. On a division, all the sections of clause 110 of 1872 were carried, the first only by 10 to 6 votes, the rest nearly or quite unanimously[2].

The reports of the committees recommending (*inter alia*) this clause were accepted, without debate or division, by the National Rath on Dec. 4, 1873, and by the Stände Rath on Dec. 24, 1873[3]. It was therefore included in the draft Constitution submitted to popular vote on May 29, 1874, and then accepted by an overwhelming majority of votes.

Such is the history of the origin of the clause numbered 113 in the Federal Constitution of 1874.

We must now proceed to consider its practical working and the more detailed provisions on the subject contained in the Federal law of June 27, 1874.

(1) *Disputes as to jurisdiction between Federal and Cantonal authorities.* The Federal law, Art. 56, states that when in the course of any

[1] See its *Protokoll* (Bern, 1873), p. 43.
[2] See its *Protokoll* (Bern, 1873), pp. 56–57.
[3] Protokolle über die Verhandlungen der eidgenössischen Räthe betreffend Revision der Bundesverfassung, 1873–4 (Bern, 1877), pp. 182, 365.

suit pending before the Federal Court, it is maintained by one side that the matter is one within the jurisdiction of a canton, or one that ought to be settled by a foreign government or by arbitration, the Federal Court itself decides whether it has jurisdiction or not. If, however, the quarrel is between the Federal Court and Federal Executive, the Federal Legislature, by Art. 85 (13) of the Constitution, decides in the last resort[1]. With this exception, and the provision that Federal laws, decrees, and state treaties are binding on it, the Court has full powers in this matter.

The first case under this head was that of Neufchatel in 1879, when the Court declared by a majority that the point at issue (whether or not the canton should in 1876 pay to the Federal Executive the half of the amount of the tax paid in lieu of personal military service, and due by virtue of Art. 42 of the Federal Constitution, the canton disputing the claim on the ground that a Federal law on the subject was not yet passed, and that it therefore remained within the jurisdiction of the canton) was an administrative question, and that it did not fall within the jurisdiction of the court. A similar decision was given in 1885, in the dispute between the Federal Court and the judicial authorities of the canton of Ticino[2].

(2) *Disputes between cantons relating to constitutional matters.* The Federal law, Art. 57, enumerates under this head, boundary disputes, interpretation of intercantonal treaties, and further questions as to jurisdiction in disputes between the authorities of different cantons, in which a cantonal government itself applies to the Court[3].

Cases are frequent under this head, e.g. intercantonal extradition questions, questions as to overflow of lakes, and rights over rivers[4].

(3) *Complaints of the infringement of the constitutional rights of citizens, and of private persons in case of infringement of concordats and State treaties.* Orelli is of opinion that this section covers the most important and most frequently exercised portion of the jurisdiction given to the Federal Court by Article 113 of the Constitution.

The Federal law of June 27, 1874, Art. 59, adds 'corporations' to 'private persons' (in *both* cases), probably because the former are

[1] Dubs states that it is held in the latter case that there must be a formal suit between the two Federal authorities to justify a decision on the part of the third, and that a mere difference of opinion will not justify such an appeal.

[2] Blumer, iii. 170–1.

[3] It is held that in such cases a decree of one cantonal government is not required to enable another to apply to the Court, a decree of a subordinate official being quite sufficient ground for an appeal (Blumer, i. 244).

[4] Blumer, iii. 171.

at law invested with certain attributes of personality. It lays down that the rights violated may be those guaranteed either by the Federal Constitution and by Federal laws passed to carry out the Federal Constitution, or by the Government of the canton to which the plaintiff belongs; while 'concordats' are explained to include all solemn intercantonal agreements, 'treaties' being those made with foreign States. *In each case* the complaint must be against ordinances of cantonal authorities, and must be lodged within sixty days after these ordinances have come into force.

It is held that the latter provision excludes complaints against Federal or 'Gemeinde' (parish) authorities, but not against inferior cantonal authorities; and that the expression 'rights' must be taken strictly, and does not include cases of disobedience to those parts of a cantonal constitution which deal with organisation, or to cantonal laws. Further, an appeal lies only in the case of *certain* Federal laws—those which deal in a more detailed manner than the Constitution, thus simply expounding it, with rights guaranteed by the Constitution of the Confederation or of a canton. In a decision given in 1883 the Court seemed however to have claimed jurisdiction when the rights were not strictly 'constitutional,' but based on private law (in this case a trade mark) if this last has been the subject of a Federal law[1].

The Court has held that the limitation of sixty days does not exist when there have been infringements of the Constitution of which the effects are still felt, or if the defendant does not claim it[2]. Also that it has jurisdiction where justice has been denied by a cantonal authority on flimsy pretexts or by an arbitrary interpretation of the law[3].

In one case, the Court entertained the suit of a foreigner, not residing in Switzerland, who could not rest his case on any treaty, but alleged that he had been denied a hearing by a cantonal authority. As a rule, the cases of foreigners, resident in Switzerland, have been held to fall within the jurisdiction of the Court, not only by reason of State treaties, but as a personal right, provided of course that the cases concern the infringement of rights guaranteed by the Constitution, Federal or cantonal. In fact, foreigners residing in Switzerland enjoy, so far as clause 113 is concerned, the same rights as natives[4].

In the case of State treaties with foreign countries, Art. 58 of the Federal law of June 27, 1874, provides that in the case of demands for the extradition of a criminal, the Federal Court is to decide, if

[1] Blumer, i. 245–6, iii. 171–3.
[2] Dubs, i. 89.
[3] Orelli, 42.
[4] Blumer, iii. 175–7.

there is any dispute, whether this demand is justified by the treaty made with the particular nation, while the Federal Executive is to carry out the provisional measures which may be necessary. In the case of extradition disputes between cantons the jurisdiction of the Federal Court is held to rest on Article 113 and the Federal law, Article 57: but in virtue of Arts. 67 (reserving this question for Federal legislation) and 113 γ of the Federal Constitution and Federal law, Art. 59, the accused person has a personal right of appeal to the Federal Court, provided of course he is not caught in the act, or is not in the power of the canton demanding his extradition[1].

So much for the practical working of the main provisions of Article 113. We now come to the very intricate questions which have been raised by the provision that 'administrative disputes, to be more precisely determined by a Federal law, are reserved,' i.e. are not within the jurisdiction of the Court. These are enumerated in Art. 59 of the Federal law of June 27, 1874, under ten heads, as follows:—

1. Gratuitous equipment of soldiers.
2. Cantonal school matters.
3. Freedom of trade and commerce.
4. Certain taxes on consumption, and import duties on wine and other alcoholic drinks.
5. Rights of 'settlers' (i.e. not full citizens).
6. Freedom of religious belief and of conscience and of religious worship, except special taxes for religious purposes and matters relating to the formation or separation of religious societies—both of which are within the jurisdiction of the Federal Court[2].
7. Civil status and cemeteries, so far as legislation attributes these subjects to the Executive.

All these subjects are, by virtue of Arts. 85 (12) and 102 (2)[3], within the jurisdiction of the Federal Executive, from which there is an appeal to the Federal Legislature.

8. Interpretation of certain Federal laws provided for in Articles 25 (fishing and hunting), 33 (scientific professions), 34 (factories, emigration agents), 39 (bank notes), 40 (weights and measures), and 69 (epidemics and cattle plague).
9. Complaints against cantonal elections and ballotings.
10. Matters arising from those stipulations of treaties with foreign

[1] Blumer, iii. 182–4.

[2] I believe that the case of the Salvation Army (or 'Salutistes') was held to fall within the jurisdiction of the Federal Executive (with an appeal of course to the Federal Assembly), on the ground that it was not a legally recognised religious association.

[3] The former of these is cited above (under 1848): the latter simply provides that such appeals as are not by Art. 113 transferred to the Federal Court remain with the Federal Executive.

States which relate to commerce, customs, patents, 'settlement,' exemption from tax in lieu of personal military service, emigration.

These last three categories are assigned to the Federal Executive (with an appeal to the Federal Legislature) by the present law.

It is obvious at the first glance that this division of subjects between the Federal Court and Federal Executive is based on no principle whatsoever. Strictly speaking, all disputes of any kind between the Confederation and the cantons ought to be handed over to the Federal Court. But in this division school, religious, election, and other matters are given to the Federal Executive. Such a rough apportionment of subjects is very confusing and unscientific: but it is to be explained by the reluctance of the Federal Legislature to create too strong a Federal Judiciary, for, as we have seen in the debates on clause 113, all parties were agreed that it was undesirable to approach the American model too closely, and hence decided to group under the heading 'administrative' certain matters which are of a distinctly political nature (i. e. schools, elections, religious disputes, 'settlement').

To the same cause also is due the provision that all Federal laws, Federal decrees binding all citizens issued by the Federal Legislature, and State treaties approved by the same authority, should be binding on the Federal Court. Dubs, though the clause is due to him, seems in his book (ii. 92) to favour the American system, by which the Supreme Court can decide whether any Federal law or decree is or is not in accordance with the Constitution: and hints that whereas formerly the omnipotence of governments was to be feared, now it is the omnipotence of legislatures that is to be dreaded. Blumer (i. 179–180) goes so far as to declare that by this provision the most important questions as to jurisdiction (as to the constitutionality of a law or treaty) are withdrawn from the Federal Court, and states that the only safeguards against the abuse of power on the part of the Legislature are the 'Referendum' (or popular vote to which all Federal laws must be submitted at the demand of 30,000 qualified Swiss citizens or of eight cantons), and the requirement that a new clause or revised clause of the Federal Constitution can only become law if adopted by a majority of cantons as well as of voters. Otherwise he seems to think that cantonal sovereignty (despite the guarantee of Article 3 of the Constitution) is in considerable danger at the hands of the all-powerful Federal Legislature.

Besides the limitation of sixty days, the Federal law provides that in cases falling under Article 113 all proceedings shall be conducted in writing, and only in exceptional cases, at the request of

one of the parties, can oral explanations be given to the Court. Further, as a rule, in such cases no court fees, or damages, are given. All this helps poor suitors to carry their cases to the highest Federal Court without being crushed by the expenses which generally accompany an appeal to a supreme court of justice, or by the superior rhetoric of a wealthy and powerful opponent.

From all that has been said on Art. 113, it will be seen that the Swiss Federal Court has been made intentionally weaker, so far as regards its power of interpretation of the Constitution, etc., than the American Supreme Court. Cantonal sovereignty in Switzerland is even more treasured than States' rights in America, and of course of far greater antiquity: in Switzerland there is the additional difficulty of a fourfold nationality and a fourfold tongue, so that its progress towards a centralised government must ever be very slow. It is true that the jurisdiction of the Swiss Court is comparatively limited in constitutional matters, but the jurisdiction itself is of very modern date, and will no doubt grow in course of time.

To complete our account of the Swiss Federal Court, it is only necessary to add that by Article 102 (5) of the Constitution the execution of its decisions is placed in the hands of the Federal Executive, while by Article 85 (7) the prerogative of pardon and amnesty is vested in the Federal Legislature.

To sum up. It is very hard for us in England to realise the position of things which renders the existence of the Federal Court necessary in Switzerland, and yet hampers it in the matter of jurisdiction. If we were to suppose that many English counties had codes of laws and customs differing from each other nearly as widely as the Scotch and English systems, that national feelings were as vigorous, and national languages as numerous as in Switzerland, we might better understand the creation, and the comparatively limited powers of the Swiss Federal Court. The United States in most of these particulars have a great advantage over Switzerland, and hence its Supreme Court is far stronger than the Swiss one. The German Empire suffers from some of the drawbacks we have pointed out even more than Switzerland itself, and hence the Imperial Court is a mere shadow. The Swiss Court represents the mean, and in the special circumstances of the case it is as good as can be wished for. Practically its civil jurisdiction is by far the most important part of its functions, and its criminal jurisdiction the least important. It has indeed to share with the Federal Executive and Legislature the power of interpreting the Federal and cantonal constitutions and treaties, and no doubt in many points the division of functions is illogical and absurd. But it

scarcely becomes Englishmen to criticise too severely the mixture of legislative, executive, and judicial powers in Switzerland, when we remember that in England the supreme Court of Appeal is double-headed also, and that while the House of Lords is primarily a legislative body, the Privy Council is primarily an executive body, though with certain legislative functions also. We are used to this confusion of powers here, and find that practically it does not work ill. It is not likely that we shall soon get rid of it, and when either Home Rule or Imperial Federation is realised, the double-headed English supreme Court will probably work, despite certain advantages, not much better than the Swiss Federal Court with all its serious disadvantages. The large scale in the one case tends to blind us to many drawbacks which exhibit themselves on a small scale but too clearly in the Swiss case.

It must also never be lost sight of that the difficulties of interpreting (as in Switzerland) a written 'fundamental law,' which can be altered only in a very solemn and elaborate way, are far greater than any likely to be met with in a country like England, where there are no 'fundamental laws' at all, and where the Constitution rests partly on custom and partly on statutes, either of which may be altered by another statute. It would be impossible to witness in any country on the Continent such a sight as was presented at Westminster on March 19, 1888, when one House of the Legislature was engaged in discussing a scheme for 'mending' itself in a fashion not unlike 'ending' itself, while the other heard that the old system of local government, from which the lower House of Parliament itself sprang, was about to be swept away by an ordinary public bill introduced by a Conservative Government.

W. A. B. Coolidge.

FEDERATION AND PSEUDO-FEDERALISM.

IT must be assumed that the leaders of the movement, having for its object the federation of that portion of the Anglo-Saxon race owing allegiance to Her Majesty, are not pursuing such a 'Will-o'-the-Wisp' as a federal union freed from the underlying principles of federalism. Such a pursuit cannot seriously claim the attention of reasonable men. Setting out with this assumption, it is intended to point out some of the things which federalism involves, to endeavour to clear up certain errors, and to exhibit a few of the many difficulties which those who favour the new movement must confront.

Federalism is the expression employed to denote the sum of the principles underlying those systems of government whereby several sovereign communities are permanently united for certain defined objects without becoming absolutely one. The term 'federal' implies a 'foedus,' or 'treaty,' in short a contract to which sovereign states, or communities in an equal degree of dependence, or independence, are parties. The essential to the inception of a federation is the possession of equal liberty by the several members of the proposed federal league: without equality in point of freedom there cannot, in the true sense, be any such league. The constitutions of the different states composing the union need be no more defined than that of the United Kingdom, but those subtractions from their respective sovereignties, which are handed over to the federal government and placed perpetually in commission, must be definitively settled. The federated communities continue separate as amongst themselves, although they become one as to the external world. Neither the state, nor the federal government, is supreme within the limits of the state, or the union. It requires the state and federal legislatures, the executive and judiciary, combined to make up the sum of the sovereignty of the several and united communities. The countries forming the federation cease, in the most important matters of a nation's life, to have any place in international politics: in their stead arises the creature of the compact, the Federal Government. Accept federalism as the basis of government, and the Parliament of the United Kingdom is no longer supreme. Great Britain would count for no more than New Zealand, or Tasmania, in such an arrangement of the sovereign power. The federation of the mother-country with her subject colonies would have this singular constitutional effect, namely, the

latter would first attain independence in order to enter into the federal compact, and, having become independent, would be free to alter their constitutions at pleasure. For example, nominated governors might be replaced by elective ones, just as was done in the United States after the American Revolution.

It may be taken for granted that no one who has seriously studied the subject is of opinion that it is desirable that the Colonies should be represented in the Imperial Parliament, or that such representation would be in any sense the equivalent of federation. The bare mention of the Irish question is a sufficient warning that such unions are to be avoided. The experiment of enlarging the boundaries of the United Kingdom is too dangerous to be attempted; an extension of such a kind would be in no sense a federation. The perfect federal compact seeks to form a permanent union and to prevent the possibility of unification. Where federalism is fully accepted, the separate existences of the several component parts is not in danger of being engulfed in that of the whole. If the act of union tend towards the final extinction, as political entities, of the different communities composing the confederacy, the result is not a perfect federation: it is more correct to say that in such case there is no federation at all. If, again, the constitution places unitarian in conflict with federal principles, the consequence is not federalism, but a hybrid form of government which exposes the communities desiring to be united to the shocks of chronic revolution, and to the dangers of dissolution.

The original constitution of the Colony of New Zealand is an example of the first evil, and that of the United States of the second. New Zealand was endowed with a General Assembly answering to the Congress of the North American Union, and Provincial Councils corresponding to the state legislatures. Colonization was carried on from several centres, a circumstance naturally tending to prevent unity without forbidding union. But, unfortunately, the ill-defined powers as well as the necessities of the central government secured the gradual extinction of provincialism without attaining absolute unity. The transition, however, was an easy one.

The federal legislature of the United States is the most notable example of that confusion of ideas generally attendant upon a new departure in experimental politics. A close examination of the structure of the Union is necessary in order to avoid falling into the errors of some professed admirers of federalism. Republicanism is admirably adapted to the genius of the American people. The form of government, however, is so far from being completely federal, that it is the greatest element of danger to the existence of

the Republic. The electorate of the House of Representatives is the whole population of the Union treated as one people[1]; that of the Senate, the several state legislatures, each state returning two senators chosen from amongst its inhabitants, and each senator having one vote[2]. Money bills originate with the House of Representatives, although the Senate may make amendments therein[3]. The power of the purse is consequently vested in the Chamber which represents mere numbers, rather than in that which is the mouth-piece of the federal units, the states. Undoubtedly the right to amend financial measures is an important one, but it is greatly inferior to that of originating them.

A system such as the American can only work smoothly whilst population is comparatively evenly dispersed and the interests of the several states are very nearly identical. Where vast inequalities and serious divergencies of interest exist, as in the case of Great Britain and her colonies, a dead-lock would ensue under such a form of government, which war alone could relieve. The history of the forty years immediately preceding the Civil War sufficiently established the fact that the American Constitution has a tendency to produce legislative as well as executive paralysis amid the strife of two opposing elements, the one national, the other federal. During that period many important territories ripe for admission into the Union were kept without its pale simply because the majority of the States in the Senate had determined not to admit them unless their respective constitutions recognised the institution of slavery, and afforded guarantees for its maintenance, whilst the majority of the people in the House of Representatives had evinced an equal determination against admission on such terms. When the state of New York with 5,000,000 inhabitants and that of Delaware with 146,000 are represented in proportion to population in one branch of the legislature, and each by two members in the other, it is evident that the continuance of a union exhibiting such inequalities depends entirely upon chance. Under a system of the American type the centripetal force of what is sometimes called 'unitarianism' perpetually threatens to overwhelm the centrifugal force of federalism. Granted that the old pro-slavery combination has been broken up, the boldest cannot say that no further internal dangers threaten the Union. American experience has shown that under the form of government now in question conflicts of interest will only continue constitutional so long as the senatorial majority can prevail against the influence of

[1] See Article I. sec. 2. subsecs. 1 and 3 of 'The Constitution of the United States,' and sec. 2 of the 13th amendment.

[2] Ibid., Art. I. sec. 3. subsecs. 1 and 3. [3] Ibid., Art. I. sec. 7. subsec. 1.

mere numbers as represented in the Lower House. Let a deadlock ensue and but little stands between a people similarly governed and civil war. A system entailing such consequences is not federal.

The nationalising tendencies of the North American Union are not found in the House of Representatives alone. The depositing of the executive power in the hands of one man, the President[1], is equally inimical to the continuance of a federal, as distinct from a national, form of government. The number of presidential electors allotted to each state is based upon population[2]. The President is therefore the choice of the citizens, not of the States. In the executive sphere the corporate influence of the different communities composing the Union is quite insensible. The occupant of the Presidential Chair is dominated by the idea of responsibility to the individual atoms of the composite nation; he is not overwhelmed by the thought of his shadowy obligations to the federal units. It is consequently not surprising to find that Presidents of the United States have been swayed in times of public danger by national, not federal, influences. Mr. Andrew Jackson, although elected by the same party as chose Mr. Calhoun to be Vice-President, could not continue his political alliance with the states which had determined the issue of the presidential election, when the nullification movement had taken definite shape under his colleague's guidance in South Carolina. In President Jackson's proclamation of the 10th December, 1832, concerning the Nullification Ordinance passed by 'a convention assembled in the State of South Carolina,' it is made abundantly clear that the Union's Chief Magistrate is a national, not a federal, officer. In that document he says: 'We are One People in the choice of President and Vice-President. Here the States have no other agency than to direct the mode in which the votes shall be given. The candidates having the majority of all the votes are chosen. The electors of a majority of states may have given their votes for one candidate, and yet another may be chosen. *The people then and not the states are represented in the executive branch*[3].' And, in his Inaugural Address, delivered upon the 4th of March, 1861, President Lincoln says: '*The Chief Magistrate derives all his authority from the people*, and they have conferred none upon him to fix terms for the separation of the States[4].'

[1] See 'The Constitution of the United States,' Art. II. sec. 1.

[2] Ibid., Art. II. sec. 2.

[3] See Story's 'Constitution of the United States,' 4th ed., vol. i. p. 745. The Proclamation is fully set out in the Appendix, vol. i. pp. 739 748. The italics in the above quotation are the writer's.

[4] Ibid., p. 751.

The national executive combined with the popular Chamber determined the issue of the Slavery Question, notwithstanding that, until the moment of Secession, the Senate remained the stronghold of the Slave Power. When the final judgment of the ballot-box summoned the Anti-Slavery candidate to preside at White House, the cause of state-rights was lost, and the force of numbers triumphed. Those who are enthusiastic in behalf of British Federation should seriously take note that the result of successive struggles has been to give the political machine of the Union an impetus in the direction of unification rather than of unity, and to threaten to sap the vitality of the states owing to the growing tendency to endow the central government with the force of national authority. Imperceptibly the written Constitution is being strained into unison with the national march of the Republic, and 'there is very great probability that the ground thus occupied will be permanently possessed, and instead of being afterwards abandoned voluntarily, may not even be contested by those who might have done so with vigour and effect under other circumstances. How far this should be so we do not discuss; that it is so in fact is unquestioned.' So says the Editor of a recent edition of Story's 'Constitution of the United States[1].'

So far from being a true federation, republican North America affords a spectacle, not altogether promising, wherein there is the continual conflict of the diametrically opposite forces of nationalism, or, more properly speaking, unitarianism, and federalism. Not only is this the case, but as a matter of fact the centripetal national force threatens to sap the foundations of the federal structure. With a Senate, and an executive deriving its origin and power from the senatorial body, the jarring interests of the vast Republic might be kept under control. Of the United States, and indeed of every union which threatens to replace the state by the individual units, it may be affirmed that its chief perils are certain to proceed from within, and not from without. Better far disintegration than unity so perilous. With prophetic foresight Mr. Justice Story, in 1832, wrote:—

'The influence of the disturbing causes which, more than once in the Convention, were on the point of breaking up the Union, have since immeasurably increased in concentration and vigor. The very inequalities of a government confessedly founded in a compromise were then felt with a strong sensibility; and every new source of discontent, whether accidental or permanent, has since added increased activity to the painful sense of these inequalities. The North cannot but perceive that it has yielded to the South a

[1] See 4th ed., vol. i. note, p. 216.

superiority of representatives, already amounting to twenty-five, beyond its due proportion; and the South imagines that, with all this preponderance in representation, the other parts of the Union enjoy a more perfect protection of their interests than her own. The West feels her growing power and weight in the Union; and the Atlantic States begin to learn that the sceptre must one day depart from them. If, under these circumstances, the Union should once be broken up, it is impossible that a new constitution should ever be formed embracing the whole territory. We shall be divided into several nations or confederacies, rivals in power and interest, too proud to brook injury, and too close to make retaliation distant or ineffectual. Our very animosities will, like those of all other kindred nations, become more deadly because our lineage, laws, and language are the same[1].'

Three years later De Tocqueville gave to the world his 'Démocratie en Amérique.' That great political philosopher was not without the apprehension that beneath the seemingly placid surface of the American system of government there slumbered a mighty volcano. Apologetically he writes:—

'Tous les États sont jeunes; ils sont rapprochés les uns des autres; ils ont des mœurs, des idées et des besoins homogènes; la différence qui resulte de leur plus ou moins de grandeur ne suffit pas pour leur donner des intérêts fort opposés. On n'a donc jamais vu les petits États se liguer, dans le sénat, contre des desseins des grands. D'ailleurs, il y a une force tellement irrésistible dans l'expression légale des volontés de tout un peuple, que, la majorité venant à s'exprimer par l'organe de la chambre des représentants, le sénat se trouve bien faible en sa présence[2].'

The proposition contained in the last sentence of the above quotation is, however, contrary to historic facts. The Senate of the United States, unlike every other Second Chamber in the world, is superior, in ability and influence, to the Lower House. In ordinary times it directs the whole internal and external policy of the Union. The history of the Civil War has shown that, so far from realising any degree of feebleness in the presence of a hostile House of Representatives even when combined with the executive power, the senatorial majority, or a considerable proportion of such majority, are prepared to retire from the forum, in order that the malcontent States may acquire by the sword that which peaceful arts have failed to obtain.

Whilst De Tocqueville was full of faith in the generous soil and the great capabilities of the Union, he was oppressed by the

[1] See Story's 'Constitution of the United States, 4th ed., vol. ii. p. 630.
[2] See 'Démocratie en Amérique,' 16ème ed., tom. i. p. 199.

thought that its very magnitude was its greatest weakness. In his vision of the future he beheld one hundred millions peopling its vast area at the end of a century from the time of writing his great work. And yet he sorrowfully admits that, when the Republic will have become so populous, 'le maintien du gouvernement fédéral n'est plus qu'un accident heureux[1].'

Switzerland has avoided the concentration of the executive power in the hands of one man, and has deposited it with the elective Federal Council, consisting of seven members chosen by the Federal Assembly. But, like the United States, it parcels out the legislative functions, dividing them between the National Rath, or House of Deputies, elected by the people at large, and the Stände Rath, or Senate, returned by the several Cantons. It is almost needless to state that the Swiss have not been without revolutionary epochs, and that unsettled questions still remain to test the vigilance and try the patience of the statesman.

In a volume entitled 'Greater Greece and Greater Britain,' published some two years since, Mr. E. A. Freeman rightly took objection, *inter alia*, to the contradictory expression 'Imperial Federation.' But when he holds up the United States and the Swiss Republic as examples of 'the perfect form of federation[2],' and calls the Congress of the Union 'a real Federal Parliament[3],' it is evident that the learned author, in combating one set of errors, has himself fallen into another, even more grievous. Surely Professor Freeman could not have given the slightest heed to the short preamble to the Constitution of the United States. If he had he would never have considered it to be the true type of federalism. But to apply the title 'federal parliament' to the Congress, in which one Chamber of the legislature is distinctly national, is to perpetrate a greater contradiction in terms than is contained in the expression 'Imperial Federation,' of which Mr. Freeman justly complains.

To endeavour to draw together the scattered fragments of the British portion of the Anglo-Saxon race, and to unite them after the same fashion as the North American Union, would be avoiding the Scylla of disintegration by falling upon the Charybdis of violent disruption. The distinction, moreover, between the compact and continuous territory of the Republic and the widely dispersed and fragmentary British lands is vital. The most conflicting interests of the several component parts of the United States are more capable of reconciliation than those of a people scattered

[1] See 'Démocratie en Amérique,' 16ème ed., tom. ii. p. 369.
[2] See 'Greater Greece and Greater Britain.' London: Macmillan & Co. 1886. Appendix, p. 132.
[3] Ibid., note, p. 133.

over the whole globe. There is hardly one point in the wide range of subjects intermediate between the Chinese Question and the Tariff upon which English and Colonial views are not totally at variance. The populations of the United Kingdom and of the British Colonies are not part of the same public, and can neither discuss questions together nor look at them in the same way. Another important point is also continually forgotten, namely, that the inhabitants of the British Isles are in large measure dominated by aristocratic and traditionary ideas, whilst the Colonies are essentially democratic, and most of them too young to possess any traditional instinct or bias whatsoever. The openly expressed contempt for, and indifference to, all Colonial matters evinced by the ordinary Englishman[1], and, unfortunately, too readily reciprocated by Colonists when opportunity offers, is but the natural result of the radical differences just indicated, differences which are in their nature irremediable. To attempt to fuse elements so opposed is an experiment too dangerous to be essayed by even the most able statesmanship.

Even granting that such perilous differences were for the present wholly wanting, there can be no doubt that Colonists, recognising their weighty obligations as trustees for future generations of the vast territories which they govern, would be unable to accept any proposed form of union which was not based upon the principle of the absolute equality of all the contracting parties. A scheme designed to give the preponderating control to mere numbers, and not to the federal units, would be summarily rejected by the Colonies, whilst any other plan would seriously curtail the power and prestige of the mother-country, and would for that reason be certain of rejection by the electorate of the United Kingdom. But even numerical representation would in the end prove detrimental to the political supremacy of Great Britain. It is in the nature of things that the vast areas under the government of the 'kin beyond sea' should in the near future be peopled by a population exceeding that of the United Kingdom. The rapid growth of the United States will no doubt have its counterpart in that of the British Colonies. In the Great Republic the Eastern States are full of apprehension at the gradual westward march of empire; is any British statesman prepared to submit his country to the chances of a similar transference of the political centre of gravity?

Why then pursue the perilous mazes of the federal problem, in order to gratify the vain ambition of securing world-wide dominion?

[1] [Much ignorance and indifference must be admitted, though they are diminishing. We are not aware, among educated Englishmen, of anything that can fairly be called contempt.—Ed.]

The names of Assyria, Persia, Macedonia, Rome, are eloquent witnesses to the ages of that doom of decay which destiny metes out to colossal states. In the interest of human civilisation it would be better far that the young Anglo-Saxon communities should aspire to enter the rank of nations, and assume the more ennobling responsibilities of full citizenship, than that they, in their newly-attained manhood, should trammel themselves with bonds, to the destruction of which they might have to devote all their matured energies. Twenty-seven years ago the world beheld one-half our race engaged in fratricidal conflict,—may it never be the lot of humanity to witness the other half in the throes of a civil war waged in every quarter of the globe.

E. W. Burton.

EMPLOYERS' LIABILITY

THAT part of the law which regulates the liabilities of employers may conveniently be dealt with as a branch of the law of master and servant. The class affected is a large one, and at present their legal liabilities and duties are only to be painfully collected from the text books, from a number of statutes spread over the statute books, and from the principles laid down in several cases by different learned judges with considerable divergence of opinion.

It would not be very difficult to codify the law on the general subject of Employers' Liability, and there is little doubt that a comprehensive measure will at no distant date be demanded from the Legislature. The Truck Act, the Employers' and Workmen Act, and the Factory Acts, do not deal so much with the general subject as with particular trades and particular disputes, and for present purposes the Employers' Liability Act of 1880 may be taken as the principal Act dealing with the subject on the wider basis.

The Act in part enacts what is already part of the Common Law, namely, that a master is responsible for defects in his plant and works which he might have discovered by exercise of reasonable care, and for the consequences of obedience to improper rules or bye-laws made by him, and in part specifies certain exceptions, not exceeding five, to a well-known Common Law principle that a master is not responsible for injuries to his servants which are caused by their fellow-servants[1].

To carry this latter provision into effect, the Act provides that in the five cases in which an employer is made liable for the result of personal injury caused to his workmen, such employer is to be liable to the same extent that he would have been liable 'if the workman had not been a workman of, nor in the service of the employer, nor engaged in his work.'

The five cases may be summarised as follows:—(see subsections 1 to 5 of section 1 of the Act).

Where the injury is caused:—

1. By defects in the condition of the ways, works, machinery, or plant of the employer[2].

[1] See *Wilson* v. *Merry*, L. R. 1, House of Lords, Scotch Appeals, 326, where Lord Cairns on p. 332 states the Common Law principle as follows:—'But what the master is in my opinion bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources. When he has done this, he has in my opinion done all that he was bound to do.' See also Lord Bramwell's judgment in *Rourke* v. *White Moss Colliery Co.*, L. R. 2 C. P. D. 205.

[2] A way is not defective by reason of a temporary obstacle upon it (*McGiffin* v.

2. By the negligence of a superintendent or 'person having superintendence entrusted to him' in the service of the employer [1].

3. By improper orders given by a person superior to the workman injured, to whose orders such workman was bound to conform [2].

4. By obedience to improper rules or bye-laws of the employer, or to improper instructions given by any person delegated with the employer's authority [3].

5. By the negligence of any person in the service of the employer who has the charge or control of any signal points, locomotive engine or train upon a railway [4].

But there are provisoes applicable to each of these five cases which narrow still further the extent of the employers' liability. The most important of these provisions are to the following effect:—(see section 2 of the Act, subsections 1 to 3).

1. There is no remedy for the injured workman under the first head unless the defect arose from, or had not been discovered or remedied owing to, the negligence of the employer, or some person in his service, and entrusted by him with the duty of seeing that the ways, &c., were in proper condition [5].

2. There is no remedy under the fourth head unless the injury resulted from impropriety or defect in the Rules, Bye-laws, or Instructions therein mentioned; and if a Bye-law has been approved by the Board of Trade or a department of the Government, it is not to be deemed an improper or defective Rule or Bye-law [3].

3. There is no remedy under any of the heads in any case where the workmen knew of the defect or negligence which caused the

Palmer's Shipbuilding Co., 10 Q. B. D. 5); nor is it necessarily defective if no precautions are taken to prevent rubbish falling into it (*Pegram* v. *Dixon*, 55 Law Journal, Q. B. D. 447). Machinery is not defective because it is dangerous (*Walsh* v. *Whiteley*, 21 Q. B. D. 371); but a lift is defective if it is not in a proper condition for the purpose to which it is applied (*Heske* v. *Samuelson*, 12 Q. B. D. 30). 'Works' mean works already constructed (*Howe* v. *Finch*, 17 Q. B. D. 187).

[1] This does not include any workmen ordinarily doing manual labour or a foreman working with the men at an extra rate of pay (*Shaffers* v. *General Steam Navigation Co.*, L. R. 10 Q. B. D. 356). See also *Osborne* v. *Jackson*, 11 Q. B. D. 619; *Kellard* v. *Rooke*, 21 Q. B. D. 367; *Moore and others* v. *Gimson*, decided January 14, 1889; and see sec. 8 of the Act.

[2] See *Kellard* v. *Rooke*, ante, and *Milward* v. *Midland Railway Co.*, 14 Q. B. D. 68. The employer is not responsible unless orders causing the accident are actually given by a person whose orders the workman is bound to obey (*Elliott* v. *Tempest*, 5 Times Law Reports 154; *Howard* v. *Bennett*, 5 Times Law Reports 136; see also *Bunker* v *Midland Railway Co.*, 47 Law Times N. S. 476).

[3] There appears to have been no decision on this subsection.

[4] See *Cox* v. *G. W. Ry. Co.*, 9 Q. B. D. 106; *Gibbs* v. *G. W. Ry. Co.*, 11 Q. B. D. 22, 12 Q. B. D. 208; in which latter case it was held that a person whose duty it was merely to clean and adjust points had not charge or control of them within this subsection.

[5] *Kiddle* v. *Lovett*, 16 Q. B. D. 605, where it was in effect held that the employer who employed a competent contractor to fix a stage which fell and injured a workman, was not liable to the workman under the Act. It may be mentioned on this point that there appears to be a defect in the Bill of 1888. As the section was drafted the employer is not protected even if he employs a competent contractor to build or arrange his works. This surely is carrying his responsibility beyond any necessary or reasonable limit.

injury, and failed within a reasonable time to give, or cause to be given, information thereon to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of such defect or negligence [1].

And not only is the employer protected by the provisoes of the Act, but also by reason of the clause quoted in the fourth paragraph all the defences which an employer had against a workman before the Act of 1880 was passed are open to him, except so far as such defences are modified by the Act. These defences may be stated as follows:—

1. Except in the five cases mentioned in the Act, a master is not responsible under the Act to a servant for the negligence of any of his fellow-servants [2].

2. Contributory negligence is still a defence to any action by a servant [3].

3. If the servant knows of the danger and voluntarily incurs a risk, the master is protected in the case of injury to the workman if he (the master) was ignorant of the danger; but if the servant can establish the fact that he warned some superior of the danger, or that such superior knew of the danger, the master will not be excused [4].

4. The servant takes the ordinary risks of his employment, and must protect himself against all but latent and extraordinary dangers unless he knows that the employer or some one superior to himself in the service of the employer knows of them [5].

5. If his fellow-servant in acting outside the scope of his duties injures him, the master is not responsible [6].

There are, moreover, further difficulties with which the workman has to contend.

In the Act itself there are defects, some of which have, and some of which have not been noticed and amended in the Bill introduced last session.

1. The employer is not responsible under the Act for his own negligence, except in cases falling under subsections 1 and 4 of section 1, though of course he remains responsible at Common Law;

[1] In a dissenting judgment delivered in *Thomas* v. *Quartermain* by the Master of the Rolls, he uses the wording of this subsection as the basis for an argument that the defence of *volenti non fit injuria* is not now open to the master. As the cases however stand at present this view cannot be maintained.

[2] *McKroy* v. *Waterford Steamship Co.*, 18 L. R. Irish 159.

[3] *Thomas* v. *Quartermain*, 18 Q. B. D. 685.

[4] *Thomas* v. *Quartermain*, 18 Q. B. D. 685; *Baddely* v. *Granville*, 19 Q. B. D. 423; *Yarmouth* v. *France*, 19 Q. B. D. 647; *Walsh* v. *Whiteley*, 21 Q. B. D. 371.

[5] *Lovell* v. *Howell*, 1 C. P. D. 161. See the judgment of the present Master of the Rolls in *Heaven* v. *Pender*, 11 Q. B. D. 503, on page 509.

[6] *Stevens* v. *Woodward*, 6 Q. B. D. 318.

and if it were not for decisions such as that of *Griffiths* v. *The London and St. Katharine's Docks*[1], it might be more advantageous to the workman to sue at Common Law.

2. If the employer dies before action brought, his executors are not liable to compensate the workman or his representative for injury[2].

3. The employer is merely responsible for personal injury. He is not responsible for injury to the property of the workman or to his estate[3].

4. The definition of workman is narrow. Domestic servants are not included; persons not engaged in manual labour are excluded. Seamen are excluded, though included in the Bill of 1888[4].

It is not to be wondered at that with all these difficulties before them the workmen are not content with the Act as it stands, or with the improvements embodied in the Bill of last session. But the workmen would do well to accept improvements or extensions which favour them, however slight; and it is no slight improvement, from their point of view, to have the benefits of the Act extended to seamen.

So far as the general liability of employers is concerned, the present Act and the proposed amending Bill are but specimens of temporary legislation. Proceeding on a principle of compromise, the Act and the Bill, if the latter passes, will no doubt have served a good purpose, but they are hardly worthy of a permanent place in a Statute Book; and what is really required is a comprehensive measure based on intelligible principles, and if possible in harmony with the Common Law.

There are two broad lines on which legislation might proceed. One is to preserve in its present modified form the doctrine of Common Employment—the principle, namely, that a master is not responsible for injuries caused to his workmen by the negligent acts of labourers in his employment; and in preserving this principle to make the employer responsible only for his own negligence or the negligence of some person entrusted by him with superintendence, modifying and recasting all the numerous provisos,

[1] 12 Q. B. D. 493, and 13 Q. B. D. 259.

[2] *Gillett* v. *Fairbank*, decided 10th May, 1887, by Lord Coleridge and Mr. Justice Smith.

[3] See a decision in a case of tort, *Pulling* v. *Great Eastern Railway Co.*, 9 Q. B. D. 110.

[4] See *Cook* v. *North Metropolitan Tramways Co.*, 18 Q. B. D. 683; *Jackson* v. *Hill*, 13 Q. B. D. 618, where a driver of a tramcar doing manual work but not manual labour and a practical working mechanic assisting a firm in advertising inventions were excluded, the one from the benefit of the Employers' Liability Act and the other from the benefit of the Employers' and Workmen Act.

restrictions, and technical defences which now avail to protect the employer.

This principle is recognised in the United States, where several jurisdictions have adopted it; see the 'Civil Code of Alabama, 1887, section 2590, where provisions closely resembling those contained in subsections 1 to 5 of the Act of 1880 are enacted; see also an Act of the State of Massachusetts passed in 1887, which contains similar provisions. Other American States (except in the case of Railway Companies) do not appear to have gone beyond the principles of the English Common Law; see the Codes of the State of Texas, Art. 5281; California, 6969 to 6971; Dakota, 1129 to 1131; where the law may be summarised as follows:—

'An employer must in all cases indemnify his employee for losses caused by the former's want of ordinary care.'

There is no doubt that the present Act might be amended and simplified in this direction, and if this principle were clearly stated in an amending or consolidating Act and a system of insurance recognised by the legislature as an equivalent for compensation recoverable under it, the law would stand on a satisfactory basis.

It is by no means clear that such a system of insurance should be made compulsory as in Germany or Russia; but a system similar to that which prevails in some of the English Railway Companies (both with regard to their servants and with regard to their passengers), and in several large collieries, might be adopted with great advantage both to the employer and the workman.

Subsection A of section 1 of the Bill of 1888, as drafted, goes beyond the principle above referred to, as it appears to make the employer responsible for the negligence of a contractor employed by him to 'arrange' his work, machinery, plant, buildings, or premises, and the conditions of the insurance scheme indicated in section 3 of the Bill appear hardly simple enough to be workable.

An insurance scheme providing for a fixed scale of payments and allowances and including insurance against pure accident, would be more beneficial to the workman than the right of action which he has at present, or which he would have under the Bill of 1888 if it became law[1].

The other and alternative course is to abolish the doctrine of Common Employment altogether, and to put the employer on the

[1] There is a form of policy in existence under which an employer can not only insure himself against claims for compensation under the Employers' Liability Act, but can obtain an insurance for the benefit of his workmen against accidental injury, even if the employer is not liable to pay the claim. Under this form of policy, if the workman dies, his representatives get a sum equivalent to one year's wages of the workman, and if he is injured, the employer is paid on behalf of the workman for a period not exceeding twenty-six weeks a sum varying from one-third to two-thirds of the wages which the workman may at the time of the accident be receiving.

same footing as regards his liability to his workmen as he now is to the outside public. A somewhat similar doctrine has recently been abolished by a decision of the House of Lords, in the case of *Mills* v. *Armstrong*, 13 Appeal Cases, p. 1, which overrules the decision in *Thorogood* v. *Bryan*, and does away with the theory that a passenger in an omnibus, or a passenger in a steamer, is to be assumed to accept the risk of negligence on the part of the driver of the omnibus in which he is carried, or the captain or officers of the steamer in which he sails.

The only precedents for total abolition in any well-known legal systems are to be found in the codes of France, Switzerland, and Italy. In that of France (see the Civil Code, Art. 1384), the employer is responsible to all his workmen without discrimination of classes, and no special notice is required to be given on the part of the injured workman, as is the case under the Act of 1880. In Italy as in Germany an Accidents Insurance Fund is regulated by legislative provisions[1].

But if the doctrine of common employment is abolished, it is still more necessary that a scheme of insurance should be admitted as an equivalent for benefit conferred by any measure introducing this principle; for it is not equitable that employers should be exposed to the risk of heavy claims in respect of accidents due in many cases not to their negligence or to the negligence of their superintendents, but to the gross carelessness of some miner, collier, dock labourer, or common workman, who has disregarded some obvious precaution, or has not sufficiently realized the importance of carefulness in his work.

H. D. Bateson.

[1] See a Blue Book, No. 21 of 1886, containing Reports on the Liability of Employers in foreign countries made in reply to a circular from Lord Rosebery issued to Consular Representatives at Paris, Berlin, Rome, etc., in March, 1886.

[I wish to record my respectful dissent from one remark of Mr. Bateson's at the foot of p. 180. It seems to me that, as regards permanent structures and plant, the owner's duty should be the same towards the workman as towards any other person who is using the structure or plant by his invitation or on business of common interest.—Ed.]

THE SQUATTER'S CASE.

THE recent case of *Agency Company* v. *Short*, 13 App. Cas. 793, is of a sort to afford sincere pleasure to every rightly constituted mind. It appears that somebody in New South Wales had, many years ago, acquired a good title, under the system of Crown grants prevalent there, to a tract of open bush or waste land near Botany Bay. For a long time he seems to have played the part of an absentee proprietor; and when, about 1885, he began to think of turning the land to some use, he found somebody else in possession of a part of it. In New South Wales the Imperial Statute 3 & 4 Will. IV, c. 27 was adopted *en bloc* by a Local Act in 1837, and the period of twenty years (our Act of 1874 not having been locally adopted) is there the common period for the limitation of actions for recovery of land. Upon inquiry it appeared that the other somebody above mentioned had not been in possession of his plot for anything like twenty years; but it also appeared that the rightful owner might perhaps have been out of possession for a much longer period. Forty years ago a third person had entered into possession; after some years he had gone away, apparently with no intention of returning; after a further interval, the somebody above mentioned had entered; and within twenty years from the last entry, the action was brought. The question was, whether this action was barred by the statute. The Supreme Court of New South Wales held that the action was barred: the Privy Council have now decided that it was not. Even the people who do not understand the grounds of the decision must feel a pious satisfaction at the disappointment of the interloping rogue who has been turned out.

Some reference is made in their lordships' judgment both to the general law of disseisin and to the statute of limitations; but the question, upon which of these grounds the decision was intended to rest, seems to require what has been styled 'considerable consideration.' The decision cannot be treated as a combined result of both these grounds taken together, because what is said about each of them separately would be quite sufficient for the purpose. On the other hand, the decision cannot easily be supposed to rest upon each of these grounds separately, because there is nothing to show that any idea of such multifariousness was present to the minds of their lordships; and it may safely be said, that judges who are of opinion that they have two separate indefeasible grounds for their

decision are never so self-denying as to talk as though they thought they had only one.

Upon the first point their lordships appear to have held that, if a disseisor goes off the land without the intention of returning, this restores the seisin of the disseisee: in other words, it operates what is technically styled a remitter. This is not the place for criticism, but the observation may be made that this particular doctrine of remitter bears about it a strong flavour of never having been heard of before, and that (to use a remark of the late Master of the Rolls) the year 1888 is rather a modern time at which to invent new law of real property. The proposition, or the idea which it embodies, is very appropriate to another branch of the law: a domicil of choice is lost by leaving the country without any *animus redeundi*; but its appropriateness to the law of seisin might be open to question if this were the place for the discussion. Here it suffices to point out that the proposition is by itself an ample ground to support the decision. If the plaintiff, at the time of the defendant's entry, had been remitted to his original seisin, it was quite superfluous to discuss the Statute of Limitations, which (on that hypothesis) had no more to do with this case than it has to do with any other case.

But even suppose that the original owner had *not* been remitted as aforesaid: it is nevertheless quite possible that his action might not be barred by the statute. That is a question, not of the general law of disseisin, but of the language of the statute itself. Upon this question it is not necessary here to express any opinion. The points to be noticed are, firstly, that the learned judges discussed the question evidently upon the above-stated hypothesis; and, secondly, that their conclusion in favour of the plaintiff supplies a second and quite independent ground, which amply suffices to support the decision.

If anybody were asked why he supposed that the question as to the statute was discussed upon the hypothesis that the original owner had *not* been remitted to his original seisin, he would probably reply: Because otherwise the question does not admit of discussion. The point is much laboured by the learned judges, and is handled in cautious and circumspect language: a proceeding which would be quite inappropriate to the discussion of something too obvious to admit of a moment's doubt. If the plaintiff really was remitted to his original seisin, he was actually seised; and in that case, if disseised, he could at any time within twenty years bring his action, without hindrance from the statute 3 & 4 Will. IV, c. 27. It would have been quite out of place to cite the judgment of Baron Parke, in *Smith* v. *Lloyd*, to prove this point. That learned

and most acute lawyer is a great authority upon nice quillets of the law; but his opinion that two and two make four, or that fifteen years are not twenty years, carries no greater weight than the opinion to the same effect of anybody else.

For these reasons it seems to be somewhat doubtful what precisely is the point which the case has decided, or whether it has decided more points than one. As New South Wales has enjoyed since 1863 the blessings of the Torrens system of registration of titles, it is a matter for some disappointment that no mention is made in the case of the relation of that system to statutes of limitation.

H. W. CHALLIS.

MURDER FROM THE BEST MOTIVES.

AN interesting and in some respects astonishing discussion, which was recently held by the New York Medico-Legal Society, is reported in the December number of the Society's Journal. Dr. Thwing read a short paper entitled 'Euthanasia in Articulo Mortis,' in which he argued that in some cases of hopeless suffering a physician is morally justified in putting an end to his patient's life. The arguments for and against such a proceeding are obvious, but what makes Dr. Thwing's paper remarkable is the calmness of his avowals as to what he has himself done. He says that he once attended a lady, a relation of his own, who was 'stricken with apoplexy and hemiplegia. The age of the patient, a widow of sixty-six years, the severity of the attack and her plethoric habit, promised a fatal issue within a day or two. She lingered, however, five days, speechless from the first, and comatose.' Details of the lady's condition follow, from which it appears that she was, in Dr. Thwing's opinion, unconscious. 'The reality of suffering I could not admit, but the appearance of it in actions, purely reflex, was painful to me. As her only surviving kinsman, I took the responsibility of administering a mild anaesthetic.' Dr. Thwing then caused his dying relation to inhale a mixture of chloroform and sulphuric ether. This treatment caused her death in a quarter of an hour. In Dr. Thwing's words, 'Respiration became easy and a general quietude secured. Euthanasia was gained and an apparently painful dissolution avoided.' The boldness of this avowal is made particularly conspicuous by Dr. Thwing's express admission that the only person for whom the lady's death, if she had been allowed to die naturally, would have been in any degree painful was not the lady herself but Dr. Thwing. It cannot be for a moment disputed that according to the law of England, and I presume according to that of New York, Dr. Thwing murdered his patient. He asserts that his reason was not that it was a saving of pain to her, but that it put an end to a spectacle which was 'painful to me.' He says he killed her purely for his own personal convenience, because she had lived some three days longer than his medical learning and experience had led him to expect. And he seems to think his example worthy of imitation.

Dr. Thwing adds another story of murder, but this time at second-hand. 'At the autopsy' of the lady already mentioned 'one of the five physicians present gave a case where he had, at the request of parents, administered ether to a child suffocating in membraneous croup, and produced euthanasia, not less to the relief of the parents than to that of the patient.' This killing, too, would undoubtedly be murder by our law, and, it seems to me, a much more morally culpable murder than that described by Dr. Thwing. It is

generally believed that young children may possibly recover from such ailments as croup when all hope appears to be extinct. The consent of the parents can of course, in such a case, no more supply a moral than it can a legal justification. It could never be possible for a physician to be certain that such consent was based on benevolence towards the child, even if there was no such thing as insuring the lives of children, or if they caused no trouble or expense to their parents.

The lawyers and doctors who took part in the discussion were not unanimous, the majority apparently agreeing with Judge Davis that such acts of 'euthanasia' were not morally legitimate, but they do not seem to have been at all alive to the far-reaching character of the right of deciding the question of life or death which is claimed by Dr. Thwing and his supporters. One of these, Mr. Clark Bell, told a story of 'a case where a child was suffering from cerebro-spinal meningetis [sic], and in awful pain. Eminent physicians were consulted, and they all decided that the child must die. I was appealed to as the one who had the best right to decide. Would they be justified in using morphine? I assented. The child was about two years of age. They administered an eighth of a grain of acetate of morphia, and followed it by hypodermic injections every thirty minutes until several grains were given, and the child did not die. They all went away saying it would die before night, but it did not die, but lived for several weeks. It died in the end of marasmus. There was no apparent chance of its recovery.' No one appears to have been shocked by this, though the word 'apparent' suggests that there was a possibility of recovery. I am not physician enough to have an opinion whether Mr. Clark Bell and his eminent colleagues were guilty of murder or only of an attempt to murder, but the story of a company of eminent physicians trying in vain to kill a baby of two years old seems to me not less repellent than Dr. Thwing's description of how he poisoned his elderly relative because her unconscious writhings annoyed him. The extracts from the discussion which I have given afford, I think, grounds enough for a very conclusive opinion as to whether doctors are to be morally commended when they seek to substitute their individual feelings and judgments for the plain and universal rule supplied by the criminal law.

HERBERT STEPHEN.

[English medical opinion and practice are, I believe, quite settled against using, for the sole purpose of neutralizing pain, any treatment that involves a new danger to the patient's life. Perhaps it ought to be added that Dr. Thwing's narrative is somewhat confused, in his first case, on the material question whether his treatment really did cause death or not. But if it did not, there was nothing to discuss.—ED.]

FRANZ VON HOLTZENDORFF.

IT is only a year ago that the present REVIEW was called upon to lament the great loss legal literature had sustained by the premature death of Sir Henry Maine. It was Franz von Holtzendorff who then, on behalf of Germany, expressed his sympathy and his appreciation of the excellent work done by the deceased[1]. It is the sudden and unexpected death of that eminent jurist himself which the legal world has now to deplore.

Franz von Holtzendorff was born of an old and distinguished family at Vietmannsdorf, in the Prussian province of Brandenburg, on October 14th, 1829. He was educated at one of the most famous public schools in Germany, the 'Gymnasium' of Schulpforta, which is equally renowned for its historical traditions (the place was founded as a monastery in 1136 by Cistercian monks, and changed into a public school at the time of the Reformation, in 1543), and for the thorough training it affords in the classical languages and literature. In 1848 the young scholar commenced his legal studies at the University of Berlin, continuing them afterwards at the Universities of Bonn and Heidelberg. In 1852, at the age of twenty-three he took the degree of Juris Utriusque Doctor at the University of Berlin, qualifying for it by a dissertation on a well-known point of Roman private law ('de rebus quarum commercium non est').

Being deeply interested in all public questions, he soon determined to visit the chief civilised countries of Europe, especially France and England, with the view of making himself familiar with their legal and political institutions. It was in Feb. 1853 that the young doctor took the first of his frequent journeys to England, a country for which he had felt a strong liking from his early youth. Public attention was in those days very much occupied by the question of prison reform. Transportation, previously made use of so successfully, had become impracticable, and was a few years later (1859) altogether abolished by Act of Parliament. A great number of criminals had to be provided for at home, and to be changed, if possible, into useful and working members of society. It was, we may suppose, the observation of these facts which determined Dr. von Holtzendorff to choose as the subject for his 'Habilitationsschrift' (i.e. a treatise the object of which is to

[1] L. Q. R. iv. p. 137.

get the *venia legendi* at a University) the consideration of the various reasons for mitigating penalties ('de causis poenae mitigandae'). At any rate, it clearly indicates the chief aim his life was devoted to, namely, that of humanising the existing system of criminal law.

Dr. von Holtzendorff was, if any one, well prepared for his academical career[1]. Having been in actual practice at the courts and in chambers for more than four years, and having continued his theoretical studies by reading for himself, as well as by preparing others for the various legal examinations, he combined a ready knowledge of the whole legal system with a power of explaining its principles lucidly and methodically, and of applying them to the conditions of actual life. If we add to this the fact that his intense interest was supported by unusual energy, which enabled him to carry into execution any new idea in the shortest possible time, his unequalled success as a teacher, as a legal writer, and as a politician, will be readily understood.

The question of prison reform both in England and France was as a matter of fact intimately connected with the penalty of transportation. Recognising this fact, von Holtzendorff began by inquiring into the nature of the institution of transportation in ancient and modern times, and its connection with the whole penal system of Rome, of England, and of France. And as on the other hand a thorough understanding and appreciation of any of the recognised penalties is impossible without a knowledge of the experience gained in using such penalty, von Holtzendorff found himself under the necessity of tracing to a very considerable extent the history of English and French colonisation[2].

These historical studies naturally led to an inquiry into the relation of the colonies to the mother-country, and their own legal and constitutional position: a very intricate question, to the discussion of which another work of the same author's is devoted[3].

Interesting and attractive as these works are to the lawyer, the historian, the politician, and even to the general reader, they are yet not to be compared in importance with his full and compre-

[1] He was admitted as 'Privatdozent' at the University of Berlin in 1857; 1861 he was made Prof. extraordinarius, and in 1873 Prof. ordinarius at the same University. In the same year he was appointed Professor of Law in the University of Munich, where he died at his residence on February the 4th of the present year. Among the immense number of distinctions conferred on him, it may suffice to mention here that he was made an hon. LL. D. of the Universities of Edinburgh and Bologna. Besides he was a member of the Institut de Droit International, foreign member of the English National Association for the Promotion of Social Science, the Howard Association in London, the American Social Science Association, etc., etc.

[2] Die Deportationsstrafe im römischen Alterthum. 1859.—Die Deportation als Strafmittel in alter und neuer Zeit und die Verbrechercolonien der Engländer und Franzosen. 1859.

[3] Das staatsrechtliche Abhängigkeitsverhältnis zwischen England und seinen Colonien. 1859.

hensive exposition of the so-called progressive prison system invented and introduced in Ireland by Sir Walter Crofton [1].

It is the great merit of Dr. von Holtzendorff that he has rivetted public attention throughout the Continent upon this ingenious system, and has shown clearly and conclusively that, while combining the advantages of the other systems it is yet an independent system with special merits of its own; for it is progressive, in that it proceeds from greater to less severity; it is active, in that it supplies a motive power, thus developing the prisoner's capacities and inducing him to work of his own accord; and, lastly, it makes use of a graduated scale of punishments (solitary, common, and intermediate imprisonment, ending with conditional discharge), thus educating the prisoner to use his liberty after his discharge both to his own advantage and that of his fellow-creatures.

The time, however, had not yet arrived for introducing into Germany so far-reaching a reform—the theoretical battle on the respective merits of the solitary and the old association system was still raging. Under these circumstances, von Holtzendorff, desirous to devote his energies to an improvement of the actual state of things, called public attention to the institution of conditional discharge [2] which, as he proved from ample experience in England, Ireland, and the Colonies, might be successfully combined with any system of imprisonment whatever.

There were besides numerous reforms needed within the sphere of criminal law and procedure, and the penal system. There existed the practice of solitary imprisonment which had been introduced without statutory authority in the gaols of Prussia: von Holtzendorff objected to it in a vigorous pamphlet [3], addressed to the members of the Prussian Diet. There existed a peculiar kind of clerical corporation taking part in prison management, and exercising its influence in behalf of the orthodox Protestant party: von Holtzendorff protested successfully against their being admitted by government authority [4]. There existed a certain subordination of the Public Prosecutor to the Ministry of Justice; moreover the privileges enjoyed by this officer as compared with the accused were matter of serious complaint: von Holtzendorff insisted on the requisite alteration of the law [5]. Lastly, there existed—and still exists—

[1] Das irische Gefängnissystem, insbesondere die Zwischenanstalten vor Entlassung der Sträflinge. 1859 (translated under the title: The Irish Convict System, more especially Intermediate Prisons). See also Kritische Untersuchungen über die Grundsätze und Ergebnisse des Irischen Strafvollzugs, 1865.

[2] Die Kürzungsfähigkeit der Freiheitsstrafen und die bedingte Entlassung der Sträflinge. 1861.

[3] Gesetz oder Verwaltungsmaxime? Rechtliche Bedenken gegen die preussische Denkschrift betreffend die Einzelhaft. 1861.

[4] Die Brüderschaft des Rauhen Hauses, ein protestantischer Orden im Staatsdienst. 1861.—Der Brüderorden des Rauhen Hauses und sein Wirken in den Strafanstalten. 1862.

[5] Die Umgestaltung der Staatsanwaltschaft. 1865.

capital punishment as an institution recognised by law: von Holtzendorff, strongly supported by public opinion, incessantly and perseveringly fought the battle for its abolition [1].

It is only natural that the various departments of criminal law which thus formed the constant object of his literary efforts down to about 1865 were also the subject-matter of his lectures at the University of Berlin. But what is more to be wondered at is that during the same period he also lectured on entirely different subjects, viz. the science of politics [2], international [3] and even ecclesiastical law [4]. These lectures account not only for his later publications, but for the fact that he was not unfrequently asked for his advice and support when questions of grave public interest were at issue. It will be sufficient here to remind the reader of his famous defence of Count Arnim in 1874 [5]; and of the opinion he gave about nine years later in favour of Roumania's rights of navigation on the Lower Danube, when that principality was carrying on its diplomatic controversy with the Austro-Hungarian monarchy [6].

Extensive as this literary activity was, his capacity for generalisation is yet to be considered. Having become familiar with all branches of public law and political science, without losing either interest in his original study of private law or familiarity with it [7], von Holtzendorff was eminently fitted to undertake a kind of codification or systematisation of legal science as it then stood.

One of his publishers had suggested that he should write a new Encyclopaedia of legal science, in a form intelligible to the general reader. While declining this offer in the shape in which it was made, von Holtzendorff nevertheless decided to carry out the suggestion in a different way. He clearly perceived two points: firstly, that a satisfactory survey of the present state of legal science could be executed only through the co-operation of several jurists, each an authority on his own subject, and he therefore induced some of the most eminent lawyers of Germany to join in

[1] Das Verbrechen des Mordes und die Todesstrafe. 1875.

[2] Die Principien der Politik. Second edition, 1879 (a useful introduction to the study of political science which has been translated into French and Spanish; an English translation is ready for publication).—Wesen und Werth der öffentlichen Meinung. 1879.—He also edited a German translation of Bagehot's English Constitution in 1869.

[3] See 'Das Europäische Völkerrecht' in his own 'Encyklopädie der Rechtswissenschaft,' vol. i.—Westlake, Lehrbuch des Internationalen Privatrechts. Deutsche Ausgabe von Fr. von Holtzendorff. 1884.

[4] Provinzialsynoden und Kirchenregiment in Preussen. 1870.—Der Kirchenstaat. 1871.—Das Deutsche Reich und die Constituirung der Christlichen Religionsparteien. —See also the Protestanten-Bibel, edited by Prof. P. W. Schmidt and Prof. v. Holtzendorff. 1872.

[5] Vertheidigungsrede für den Grafen Harry Arnim. 1875.

[6] Rumäniens Uferrechte an der Donau. 1884.

[7] G. Padeletti, Lehrbuch der römischen Rechtsgeschichte. Deutsche Ausgabe von Fr. v. Holtzendorff. 1879 (it fills a real gap in German legal literature).

the undertaking; and, secondly, that the existing Encyclopaedias laboured under serious difficulties,—the repetition in the various special articles, alphabetically arranged, of doctrines of general application; and the failure to combine a clear and connected survey of the whole field with an exposition of the particulars in the several departments. Von Holtzendorff therefore decided to divide his Encyclopaedia into a systematic part, giving a connected view of the general principles in each of the subdivisions of the whole field of law; and an alphabetical, giving the particulars of the single institutions. In spite of all difficulties, the editor succeeded in carrying out his intention. The work first appeared in 1870 and 1871; since which time it has, in three subsequent editions, increased both in size and importance[1]. It is generally admitted, both in Germany and elsewhere, to be a work unique of its kind, being at the same time concise and thorough. It has thus become *par excellence the* book of reference in all branches of law, useful alike to the theoretical and to the practical lawyer.

The principle so successfully applied on this large scale to the exposition of general principles of law was soon extended by Professor von Holtzendorff to the subjects of his own special research, viz. criminal law[2] and procedure[3], prison discipline and management[4], and International law[5]. On each of these subjects he published a large work of reference (a so-called 'Handbuch'), single subdivisions being dealt with by writers who on their respective topics were acknowledged as authorities. Of all these books it may well be said that they are 'storehouses of methodised learning,' completely covering the various departments of the subjects with which they deal. To each of these works the Editor himself made contributions, which bear the impress of his wide learning and mature judgment. To give but one instance: nowhere in legal literature is the history of criminal and of international law respectively treated with such completeness and lucidity. The want of unity necessarily resulting from the co-operative method adopted, is amply compensated for by the excellence of the great majority of the sections of these works. Thus the 'Handbücher' have become indispensable books of reference, not only for the theoretical specialist, but also for the practical lawyer or politician who is in want of more detailed information on the questions he has to deal with.

It is noteworthy that the man who, we venture to think, has

[1] Encyklopädie der Rechtswissenschaft in systematischer und alphabetischer Bearbeitung. For a review of its first part see L. Q. R. i. p. 62.
[2] Handbuch des deutschen Strafrechts. 1871-75. 3 vols.
[3] Handbuch des deutschen Strafprozessrechts. 1877-79. 2 vols.
[4] Handbuch des Gefängnisswesens. 1888. 2 vols.
[5] Handbuch des Völkerrechts. 1887-89. 4 vols. (see L. Q. R. ii. p. 84, iii. p. 463).

done more than any other in advancing the uniform and scientific treatment of law in general, is also the man to whose suggestion in 1860 was due the foundation of those successful meetings of German jurists which have become well known under the name of the 'Deutsche Juristentag,' and have been imitated in many other countries of the Continent.

So much in commemoration of the professional activity of this eminent scholar. His efforts, however, extended far beyond the limits of his profession. Being desirous of spreading general culture and interest in the great questions of the day among all classes of the population, he had from the year 1866 been editor (in connection with Prof. Virchow) of the 'Sammlung gemeinverständlicher wissenschaftlicher Vorträge,' and, from the year 1872, of the 'Deutsche Zeit- und Streit- Fragen.' To these collections he himself contributed articles on Richard Cobden; the position of women; the improvement of the social and economical condition of women; the right of conquest; the English Press; the British Colonies; the extradition of criminals; the idea of perpetual peace among nations; and the celibacy of the clergy. His choice of these subjects gives a clear idea of his aims and convictions, and at the same time shows how deeply he was imbued with the impressions he had received from his study of English life and English literature[1].

His loss will be keenly felt throughout the world; but nowhere, we are sure, except in his native land, will it be so keenly felt as in this country, with which all his thoughts and endeavours so closely connected him.

ERWIN GRUEBER.

[1] See also his charming picture, 'An English Country Squire as sketched at Hardwicke Court.' 1877 (dedicated to the Empress Frederick, then Crown Princess of Germany). Translation 1879. Also his 'Schottische Reiseskizzen.' 1882.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

The American Commonwealth. By JAMES BRYCE, M. P. London: Macmillan & Co. 1888. 3 vols. 8vo. 592, 683, 699 pp.

THE aim of the author, as indicated in the introductory chapter, is to describe American institutions and national traits as they now exist; and incursions into history are made with an apology for so far straying from his main object. Yet Mr. Bryce seldom really loses sight of the historical point of view; and in this consists much of the special and permanent value of his work. Indeed if it be permitted—by an old and pleasing association—to call *history* the work of an inquirer who observes men and nations with insight quickened and deepened by knowledge; the word might well have been used in the title of these volumes. It would be superfluous in this place to enlarge on the merits of a book which readers of the LAW QUARTERLY are doubtless only waiting for leisure to peruse, if they have not already done so. A few salient points are here noted in brief outline.

The political history of the United States begins with the creation, early in the seventeenth century, of English Settlements under Royal Charters of the type appropriate to the Guilds or Trading Companies of the period. From these charters spring, by a continuous process of evolution, the State Constitutions of to-day. Mr. Bryce selects, as a notable instance, the Massachusetts Company, with their charters of 1628 and 1691. The former (1628) was that of a pure trading company, with powers of electing officers, and of making ordinances, vested in a General Court, consisting of the Governor or Deputy-Governor and such of the eighteen 'assistants' and of such Freemen of the Company as should be present. In the Charter of 1691 the eighteen assistants become twenty-eight Councillors, and the Freemen appear in the General Court by Representatives. The General Court was empowered to establish judicatories and courts of record, and to pass laws not repugnant to the laws of England. The Governor appointed the judges. There was an appeal from the courts of law to the King in his Privy Council. It is important to note that, subject to the powers conceded by the charter, the sovereignty, including the power to alter the constitution, remained by necessary implication in the British Crown and Parliament. When, in 1776, the thirteen Colonies threw off their allegiance, the colonial charters became, with or without alterations made by State Conventions, the State Constitutions. The Constitutions of the newer States, formed by State Conventions, were more or less imitative; and thus a State Constitution came to be a written instrument, conferring express powers—in the later constitutions more detailed and therefore more restricted—on legislative, executive, and judicial authorities. What then became of the remaining powers formerly vested in the British Crown and Parliament as Sovereign? Had they accresced, or were they impliedly given, to any of the various constituted authorities; and if not, what became of them? The answer, from the common understanding and invariable usage of the American people and governments, is that these powers did not accresce, but were reserved to be exercised by the people of the State;—a people already accustomed to express

their will through conventions; and who were gradually reducing this practice to deliberate methods. By this habit the sovereignty of the people remained a reality, and by the methods the machine was weighted with a wholesome *inertia*.

The Congress of Delegates which, in 1776, declared the independence of the Colonies, subsequently framed 'Articles of Confederation and Perpetual Union.' This compact, ratified by the several States at dates between 1777 and 1781, created a League of States—in the nature of what has been marked by German publicists by the word *Staatesbund*—while carefully reserving to each State its Sovereignty, Freedom, and Independence, and every right not expressly delegated to the United States in Congress assembled.

The history of the National Government properly so-called, commences with the Convention of Delegates from five States, which met at Annapolis in Maryland in 1786. Their report, adopted by Congress, led to the Convention summoned to meet at Philadelphia on 14th of May, 1787. The crisis was universally felt to be important; and delegates, consisting of leading men in the country, influential in their several States, were sent. George Washington presided. The instructions were to revise the Articles of Confederation. These the delegates boldly exceeded. They resolved to prepare a new constitution, to be considered and ratified—not by Congress nor by the State Legislatures—but by the peoples of the several States. They sat nearly five months. Their labours were monumental. The main difficulty was to adjust two opposing forces,—the necessity felt for a strong central government, and the tenacity of the States in maintaining their sovereign rights. The result was an instrument of compromise—'perhaps the most successful instance in history of what a judicious spirit of compromise may effect.'

It remained to submit the draft constitution, in accordance with its concluding provision, to conventions of the several States (i. e. bodies specially chosen by the people of each State for the purpose):—a form of reference peculiarly fortunate, since the Conventions were formed of able men who listened to weighty arguments, and were themselves influenced by the authority of their leaders. There was a struggle everywhere over the adoption of the Constitution, a struggle in which the opposing forces above-mentioned played an important part, and which gave birth to the two great parties that for many years divided the American people. In some of the State Conventions, amendments were suggested; and of these several were adopted, in 1791, in the manner prescribed by the Constitution itself. A potent cause leading to the ultimate adoption of the Constitution, was the dread of foreign powers.

The makers of the Constitution were much influenced by the principle, formulated by Montesquieu, that administrative, legislative, and judicial functions ought to be separated; and they carried this out to an extent far beyond the practice of the British Constitution, whence Montesquieu had derived the suggestion. But chiefly they were guided by the working models of State Constitutions. Here was an experience of governments working under written constitutions; and hence they were able to perceive how far it was necessary to limit, or to express, the powers conferred by such an instrument. To another circumstance, involved with the history of the State Constitutions, Mr. Bryce attributes great influence in the working of the National Government, as well as of the State Governments. The English legal principle, that bye-laws passed by the authorities of a corporation beyond their powers are absolutely void, became applicable, as a necessary consequence of the historical development of the State Governments, to

the laws fixed by their Legislatures; and the same principle, imported by implication into the Federal Constitution itself, has become an all-pervading rule of American constitutional law.

The executive power is, by a leading clause of the Constitution, vested in the President, who is elected for a term of four years. The President has the command of the Federal Army. His power of making treaties is limited by the proviso that the concurrence of the Senate by a two-thirds' majority is required. His power of appointing ambassadors, and generally of nominating to the higher appointments in the public service, is to be exercised 'with the advice and consent of the Senate.' As to any power of removal of executive officials, the Constitution is silent. It will be readily seen that if the Senate were really to control the President, generally, in his appointments of the higher executive officials, or if he had no power to remove them, the executive power given him by the leading clause of the Constitution would be illusory. Here is the germ of a constitutional question which acquired prominence during Andrew Johnson's tenure of the Presidency. According to the ordinary practice, the President is left free, during his tenure of office, to appoint and remove the heads of the executive departments, and he practically has the patronage of a large number of inferior appointments. He has a veto, which can only be overborne by a two-thirds' majority on reconsideration in each House, over the acts of the Legislature. The exercise of the veto is frequently a popular act. In ordinary times the President is much occupied with details relating to patronage. In times of crisis, everything may depend on his judgment, courage, and loyalty to the Constitution. That the election of a President should, every four years, bring on, throughout the country, a fever of excitement lasting four or five months, has been thought by many a fault. Mr. Bryce regards it as having rather the healthy effect of rousing the nation to think of public affairs and to judge between the rival political Parties.

The legislative power under the Constitution is vested in Congress, consisting of the Senate and the House of Representatives. The principle of a legislature sitting in two houses may to some extent have been suggested by the British Parliament; but it is more directly taken from the Constitutions which existed in most of the original States. In the result the smaller House has become the more powerful. Its size is more conducive to business habits; while, in its representative character, it rests on an equal basis. De Tocqueville attributed the superior quality of its members to the system of double election; but Mr. Bryce points out that the election of senators by the State Legislatures is illusory, and that they are virtually chosen directly by the caucuses and at the polls. Mr. Bryce gives a graphic picture of the aspect of the Lower House of Congress; and mentions, as a curious feature, the system of passing resolutions on various subjects which lead to no practical result. These are frequently brought forward to please some section of American opinion; and, though heartily approved of by few (if any) in the House, are unanimously adopted because no one thinks it worth while to object. It surprises Americans to find such things taken seriously on this side the water. Though there are parties in the House they are not organised, and no one is officially responsible for the House's action. Upon large national issues, the Parties know how to vote, and vote solid.

The judicial power under the Constitution is vested in (Federal) Courts of Judicature, consisting of judges holding office during good behaviour; i.e. appointed for life, and irremovable except by impeachment. The Federal Judiciary has been in practice entrusted with the important function of construing the Constitution and judicially determining the powers created

by it. The decisions of the Supreme Court pronounced between parties in cases where the construction and effect of the Constitution touches private right, form a supplement by which the Constitution becomes a much more complete and finished production than the original instrument. This has been largely the work of Chief Justice Marshall, whose judgments are regarded in America as of the highest authority in constitutional law.

The State Constitutions of the thirty-eight States of to-day have, in their main features, a similarity of type traceable to their historical origin. Every State has an executive elective head (the historical analogue to the governor of the company or colony), various other administrative officers, a legislature of two houses and a system of courts of justice, besides various local self-governing communities—cities, townships, school-districts, etc. The Governor and chief administrative officers are now always elected, not by the Legislature, but by the people. The two-chambered legislature is now universal; and the principle is regarded in America as an axiom of political science founded on experience. The State Governor, in ordinary times, has little real power or patronage; but in times of emergency much depends on his character and energy. During the Civil War he was responsible for organising and sending forward the troops from his State; and in some States men still talk of the 'war governors' as heroes of the time. The composition and character of the State Legislatures varies greatly. The best are those of the New England States; notably Massachusetts. The worst are those of the states containing large cities with an influx of European immigrants. The judges are in twenty-five States elected by the people, in five States by the Legislature, in eight they are appointed by the Governor subject to confirmation by some other authority. The life-tenure is only retained in four States. The length of term in the other States is various, averaging about eight or ten years. The English reader may ask how does a system work where every part of the country is subject to two jurisdictions—the Federal and State courts? The answer is, the system does work smoothly in practice. In some parts of America difficulties exist in the enforcement of the law; but they are not due to any conflict between State and Federal pretensions.

The description of the National and State Governments, from which the above is outlined, is comprised in parts I and II of the book. But the description of government in its actual working would be incomplete without an account of the Parties and Party System;—the all-pervading machine which dominates the issues of both State and Federal politics. Part III (completing the second volume) analyses this machinery; and describes the various nominating conventions, the rings, bosses, tickets and delegates;—the myriad currents and eddies throughout the cities and rural districts of the Union, all working at last into the great whirlpool of a Presidential Campaign. And amidst the throng of insignificant and often unworthy actors in the various scenes, the reader is kept in mind of the greatness of the forces which determine the ultimate issues,—'the existence' (as Mr. Bryce observes in his introductory chapter) 'in the American people of a reserve of force and patriotism more than sufficient to sweep away the evils which are now tolerated; and to make the politics of the country worthy of its material grandeur and of the private virtues of its inhabitants.' This observation is more fully worked out in the following part (IV), upon 'Public Opinion.' Part V contains graphic sketches showing the working of political institutions; and among these a history of the 'Tweed Ring in New York City,' contributed by Frank J. Goodnow, occupies a prominent place. This chapter illustrates by an example Mr. Bryce's general observation. It describes the temporary

reign under legal authority in the City and State, of a gang of swindlers, while the *nemesis*, always felt impending, at length arrives through the awakened force of public opinion.

The sixth and last Part of the book, entitled 'Social Institutions,' is doubtless that which will be most widely read. It contains descriptions of the Bar, the Bench, the Universities, the Churches and Clergy;—and discusses various topics, all of large and popular interest. On a general survey, the author—as a counterbalance to the drawbacks felt in the absence of variety and often of what is interesting, in American life—points to the contemplation of some sixty millions of people throughout the vast extent of the United States, not only living in physical comfort, but generally enjoying a degree of refinement in their homes and means of intellectual culture in their leisure much exceeding the standard attainable by the masses in any European country. He concludes an estimate of the immediate future with a note of hopefulness, which he avows himself to have learnt from the Americans themselves, and will hardly fail to impart to the reader.

R. C.

The Law of Charitable Bequests, with an Account of the Mortmain and Charitable Uses Act, 1888. By Amherst D. Tyssen. London: W. Clowes & Sons, Lim. 1888. xxvi and 622 pp.

Mr. Tyssen has written a very good book, and one which shows how much our modern legal text-books have been improved by the scientific study of law. It compares most favourably with Tudor's 'Law of Charitable Trusts,' the second edition of which was published in 1862, and which is the only other modern treatise on the subject.

The book opens with the legal history of Charities, attributing, and correctly, their first origin to the guilds and fraternities of the middle ages, which gradually expanded into corporations, perhaps not attributing enough to the ecclesiastical position, training, and instincts of the first Lord Chancellors, but pointing out with much clearness how, through the medium first of guilds and afterwards of corporations, a testator was enabled to devote his property to charity and secure the permanence of his devolution.

Chapter 3, on the custom of the City of London to devise in mortmain, is decidedly good.

In chapter 5, the distinction between 'superstitious uses' and trusts for illegal religions, is well drawn; and how necessary it is to draw this distinction will be seen by any one who refers to the reasoning in many of the cases on the subject; where a confusion appears, which is only too faithfully reflected in Mr. Tudor's book.

It is not, however, clear that even with Mr. Tyssen's help we have got at the root of the law as to superstitious uses. He regards the law as being 'that all gifts to any persons expressed to be to the intent that the donees shall perform or procure others to perform any acts for the supposed benefit of the soul or souls of any person or persons are void' (p. 47), and he would state this as a general principle of law arrived at at the Reformation; and apparently would say that the law presumes such uses not to be charitable; whereupon they become void as perpetuities. But in taking this view he runs counter to the Irish decisions which he describes (p. 56) as 'some very unsatisfactory cases.'

May it not be suggested that the true view is, that such uses have been forbidden in England by positive statutes, e. g. 23 Hen. VIII. c. 10, 1 Ed. VI. c. 14, and 1 Geo. I. c. 50; none of which statutes apply to Ireland?

From 'superstitious' uses it is perhaps best to pass to chapter 9, on religious trusts; in which the historical steps by which various religious bodies not conforming to the Established Church have been allowed to receive legacies, and to found, maintain, and administer their own charities, are well stated. Mr. Tyssen, however, is not quite so strong in Ecclesiastical law as he is in other branches. He opens the chapter by saying (p. 100) that the only provision still in existence for enforcing conformity with the Established Church is the clause in 14 Car. II. c. 4, prohibiting any one but an ordained priest from consecrating the Lord's Supper; and consistently with this he places this Act of Uniformity at the head of all the statutes 'relating to the teaching of religion.' Probably on the same ground he treats 9 & 10 Vict. c. 59, as an Act for the relief of Jews only, and not of Protestant Dissenters and Roman Catholics.

But the truth is that the Edwardine and Elizabethan Acts of Uniformity —particularly the Act 5 & 6 Edw. VI. c. 1, requiring all persons to attend church on Sundays, and the Conventicle Acts of Charles II—are quite as important as the Caroline Act of Uniformity; and that the course of legislation has been not to repeal these Acts, but to exempt from time to time certain classes of persons from their operation. It is clear that no assembly for religious worship can take place except in a licensed or registered building; and if the author had hit upon 18 & 19 Vict. c. 86 he would not have stated (p. 106) that the 'minister and members' of any Church would incur no penalty 'if they abstained from registering.' It is clear that 5 & 6 Edw. VI. c. 1 still is in force to require all persons who do not dissent from the Church of England to attend service on Sunday. And § 16 of 1 Will. & Mar. c. 18 would seem to require all persons to attend some place of worship; though the pecuniary penalty in both cases is taken away by 9 & 10 Vict. c. 59.

The chapters on religious charities are followed by chapters on gifts to the poor, poor relations, schools, political gifts, which last are exceedingly well treated (pp. 177, 180), indefinite and incomplete gifts, and gifts for the benefit of particular localities and societies. Then the question, so important to London Corporations, whether the whole property is given to charity or is only charged with particular sums for charity, is discussed in chap. 22. Chapter 23 deals with foreign charities, and is not so satisfactory; because too much is endeavoured to be inferred from the anomalous and not very authoritative case of *New* v. *Bonaker*, L. R. 4 Eq. 655.

Then follow chapters 24 to 29, on 'mortizing,' a convenient word which the author has dug out of one of the older books, and which is used by the author to express both gifts to corporations, which are the real gifts in mortmain, and the bequests which are prohibited by the miscalled Mortmain Act of Geo. II. This branch of the subject is well discussed; and it opens one of the most important questions in the whole book, that is, whether 'the Mortmain and Charitable Uses Act, 1888,' alters or not the law as to personalty which 'savours of realty.' The Georgian Act prohibited the devise of land or 'any estate or interest therein,' or 'any charge or incumbrance affecting or to affect any land.' The Act of 1888 prohibits the devise of 'land'; which word it defines (§ 9) as including 'any estate or interest in land,' the words as to charge or incumbrance not being repeated. Does this leave the law as it was before the passing of this Act? Does it make the law more restrictive by prohibiting gifts to or purchase by corporations of charges or incumbrances on land? Or does it sweep away the series of, it must be confessed, very absurd decisions, which made a bequest of turnpike bonds illegal, while one of railway debentures was legal? Mr. Tyssen makes the

various points well (pp. 561, 563), and comes to the first conclusion. The second seems too absurd. But the third is, after all, in conformity with the plain words of the Act, and not unreasonable. What, however, is to be said of the legislation which leaves such a point in uncertainty?

A few brief notes and corrections are added.

Page 19. The question is asked, 'what register?' It is the Registrum Brevium.

Page 27. The Probate Act is treated as taking away the jurisdiction of the Hustings Court in the City. But surely the Act only deals with courts which prove wills of personal estate. 'Effects' is the word used in § 3.

Page 157. The case of *Spencer* v. *The Warden of All Souls College* is out of place in the book, and merely relates to the very common provision in the statutes of old colleges in favour of founder's kin.

Page 280. It should have been stated that § 92 of the old Municipal Corporations Act is substantially re-enacted by § 139 of the Act of 1882.

Page 344. Mr. Tyssen is puzzled as to shares in the New River Company. But it is clear that they are real estate; titles to them are deduced just as in other cases of realty, and they give the right to a freehold vote for Members of Parliament in every County Division through which the New River runs. To prevent misapprehension, it is convenient to add that, under a modern statute, the company has issued new shares which are distinctly personal estate, like the shares in ordinary companies.

Page 384. Has Mr. Tyssen any authority for the bold statement that a clause in a private Act of Parliament 'purporting to grant exemption from a general Act of Parliament or rule of law would have no effect whatever'?

The book has a very full index, and is not burdened with a large appendix.

WALTER G. F. PHILLIMORE.

Römische Rechtswissenschaft zur Zeit der Republik. Von PAUL JÖRS, Erster Teil: bis auf die Catonen. Berlin: Franz Vahlen. 1888. 8vo xii and 313 pp.

THIS book gives promise of filling well what has long been regarded as a void in the literature of the history of Roman law. Regret has often been expressed that we know so little about the work of the men who laid the foundations of the structure the jurists of the Antoninian period completed, —of the conditions under which they laboured, the methods they pursued, and the success they achieved. We are familiar with the names of Q. Mucius Scaevola and C. Aquilius Gallus, Servius Sulpicius Rufus and Aulus Ofilius, C. Trebatius Testa and Q. Aelius Tubero, with several of their predecessors and successors; and we are more or less familiar with some of their *dicta*, and some of the rules and remedies with which their names are associated. The Spaniard de Mayans (Majansius) last century, and more recently Sanio in his Prolegomenon zur Geschichte der Römischen Rechtswissenschaft, Roby in his Introduction to the Digest, Ferrini in his Fonti del diritto romano, and Krüger in his Geschichte der Quellen und Litteratur des Römischen Rechts, have given us notices more or less detailed of their personality and of the work they are reported to have passed through their hands; but this, so far as we are aware, is the first attempt to submit the jurisprudence of the Republic as a whole to critical treatment and to assign to it its proper place in the history of the law. Although in the 313 pages of this first part Professor Jörs has got no further than the younger Cato, yet it is easy to see that his estimate of the influence of the men whose work he has undertaken to describe is no mean one; indeed he does not hesitate, though incidentally

only and by anticipation, to award to Quintus Mucius, P.M., a first place amongst the makers of the law of Rome,—to set him on as high a pedestal as even Labeo, or Julian, or Papinian.

After a short introduction, in which he draws a contrast between the jurisprudence of the Empire and that of the Republic, and delivers himself of some critical comments on the long passage in the Digest which bears to be an extract from the Enchiridion of Pomponius, Professor Jörs enters upon the first of his three chapters. It is devoted to what he calls the Pontifical Jurisprudence. The functions of the College generally, and the nature of their intervention in matters affecting the public and private *sacra* of Rome, have often been described already: here they are touched on very lightly. The purpose of the author is to demonstrate the part the pontiffs played in forming and formulating the private law from earliest times down to the end of the fifth century of the City, or perhaps even the middle of the sixth. What he says on the subject is substantially an amplification in some ninety pages of the two or three in which Marquardt, in his Römische Staatsverwaltung, treats of 'the Pontiffs as *Jurisconsulti*.' Puchta has characterised as a mere fable the statements of Livy and Valerius Maximus that for centuries the *jus civile* was *repositum in penetralibus pontificum;* but Jörs has endeavoured to demonstrate, and has fortified his position with a much greater amount of authority than most people could have expected, that, both before and after the publication of the Twelve Tables, the knowledge of anything beyond the mere letter of the law was substantially confined to the Pontifical College. They were the advisers alike of magistrates, judges, and private citizens; they instructed the latter what words and forms were necessary to give effect and validity to their transactions; they put into proper style for them the actions and other remedies by which their rights were to be protected and their wrongs redressed. All this was done by word of mouth; but the record of it was preserved in the archives, the *libri pontificum*, which became a repertory of precedents, to which the members of the College alone had access. This was the surest way of maintaining their monopoly,—a monopoly which was only partially broken down by the publication of the *Jus Flavianum*. What affected it to a much greater degree was the practice adopted by the first plebeian pontifex maximus, Ti. Coruncanius, in the end of the sixth or beginning of the seventh century U.C., of giving his opinions (*responsa*) in public, in the midst of a circle of hearers who gradually increased in number, and who freely discussed with their master the questions upon which his advice had been solicited. This was a long step towards the popularisation of the law and the creation of a class of non-pontifical jurists. But, according to Professor Jörs, it did not at once make an end of the pontifical jurisprudence. For, although the urban praetorship had already been more than a century in existence, it was still to the pontiffs that men went for guidance in the use of the *legis actiones*, augmented in number since the publication of the Flavian Collection, by the introduction of the *l. a. per condictionem*, and for help in the construction of the stipulations which, according to prevalent doctrine, were first statutorily recognised by the Silian law. And so it came about that the *Tripartita* of Sextus Aelius, in the middle of the sixth century—Jörs holds that it was something distinct from the so-called *Jus Aelianum* of the same author—was still a monument of pontifical jurisprudence.

The second and longest chapter deals with the non-pontifical jurisprudence from the end of the first Punic War to the time of the elder Cato,—a period of great interest for the history of the law, but in which the jurists were still merely practitioners, and did next to nothing in the way of scientific treat-

ment of their subject. It opens with an account of the rise of the *jus gentium*, to which the author prefers to give the name of Weltrecht, as distinguished from the Landrecht or *jus civile*. He describes the external conditions and internal development of this *jus gentium*, with a simplicity and clearness that strikingly contrast with the undigested mass of information contained in Voigt's abysmal volumes. Then he speaks of the commencement of the praetorian edict and the formular system of procedure; next points out the influence on them of the Aebutian law; and concludes what may be regarded as the introductory part of the chapter with a definition of the relation in which the *jus civile* stood to the *jus honorarium*, the pontiffs to the praetors. It is all extremely interesting, though in some points open to criticism. The author contends, we think rightly, that it was through the agency of the peregrin praetor that the edict and the formular system first became of importance, being employed by them to facilitate the disposal of questions to which the *jus civile* and the *legis actiones* were inapplicable; and that in time his example was followed by the urban praetor, and his remedies and others of the same class adapted to the *cives*. But in his explanation how this system was extended he is at variance with Wlassak (whose Römische Process-Gesetze he says he unfortunately had not had an opportunity of seeing before his own book was in type). Jörs is of opinion that, in virtue of his *imperium*, the urban praetor at his own hand devised *formulae* for litigating questions for which hitherto the remedies had been by *legis actiones;* in other words, that in many cases he made *legis actio* and *formula* alternative, and gave a litigant his choice between them. Wlassak, on the other hand, maintains that while the praetor might and did at his own hand give a litigant a *formula* for vindication of a right dependent on the *jus gentium* or *jus honorarium*, it required the statutory authority of the Aebutian law (which is gradually being placed later and later in date) to enable him to substitute a *formula* for a *legis actio* for vindication of a right dependent on the *jus civile*. We prefer the latter view, which Wlassak has backed with arguments and authorities that are almost unassailable.

In the remainder of his second chapter Professor Jörs indicates the various directions in which the jurists who had come in place of the pontiffs manifested their activity. They had a wider field open to them than their predecessors, but substantially the work was of the same character as before. *Respondere, cavere, agere, scribere*, are words with which Cicero has made us very familiar; and what fell within each of them is here fully explained. Then come sections on the relation of the jurists to the magistrates and judges, on the ways in which the law was taught, on the literary work done by men who had time for it, and on the position of the *jurisconsulti* amongst their fellow-citizens. Finally a few pages are devoted to the elder Cato—an honour which it is not clear that he altogether merits. The last and shortest chapter deals with what is called the 'Regular-Jurisprudenz,'—the first effort of scientific jurisprudence, manifesting itself in the formularisation of abstract doctrine in the shape of *regulae*,—rules and definitions. Jörs couples with it the name of the younger Cato as the author—so it is generally assumed, but without any distinct authority—of the well-known *regula Catoniana*, sketches his life, and points out the significance of his method as the commencement of a purely theoretical jurisprudence. Does he not somewhat exaggerate its importance?

We look forward with agreeable anticipation to the second part of this interesting volume. What is already before us we regard as a valuable contribution to the literature of the history of the law of Rome. The thoroughness and conscientiousness with which every passage bearing on the

subject has been noted, scrutinised, and tested, and the skilful manner in which one has been brought to bear on another, gives us confidence that in dealing with the jurists of the last century and a half of the republic, Professor Jörs will enable us to judge how far Ihering's remark is warranted —that the *veteres*, sometimes spoken of rather lightly by their successors of the classical period, had really got much nearer the goal than is commonly supposed. J. M.

A Handbook to the Land-Charters, and other Saxonic Documents. By John Earle. Oxford: Clarendon Press. 1888. 8vo. cxiii and 519 pp.

In this book the Professor of Anglo-Saxon has given a careful and accurately printed representative selection of Old English deeds, including 209 of Kemble's documents and several not comprised in the Codex Diplomaticus Ævi Saxonici. A good glossary of thirty pages and some interesting notes, with an Introduction, make up the volume. There is no need at this time of day to explain or enforce the importance of Old-English deeds, though it is always to be remembered that they represent a very small part of the modes of dealing with law concerns before the Conquest, and that they themselves, as well as most of the transactions they cover, are of foreign origin, importations into a far older and more archaic system. It is therefore in vain, by their aid only, to attempt to reconstruct the older English law of conveyance, succession, and rights of real property. The comparison of the older French law, which is so unaccountably neglected in England, will, as a glance at the Polyptyche, or a perusal of such a handbook as M. Thévenin's 'Textes relatifs,' soon convince any one of this fact. Yet, admitting this, there is a vast mass of legal material, even in the selection before us, yet to be fully garnered and methodically worked up.

Professor Earle gives an account of the structure and outline of the instruments of conveyance represented in the book, with some remarks on the critical treatment of the later documents; but though this is good and useful, the most original part of the Introduction is that in which certain parts of the Old English system of land-tenure is passed in review. Kemble's 'mark-theory' is fairly criticised and naturally found wanting, and Mr. Seebohm's views briefly set forth and to a certain extent adopted. 'If we accept at Mr. Seebohm's hands the dominical side of the manorial constitution, we must on the other hand continue to derive the Common Fields from those free ancestral customs for which our text is Tacitus.' The new element brought into the discussion by the Anglo-Saxon Professor is his theory that we must look for traces of the military organization of the English conquerors in several points of our early tenure-system. He holds, for instance, that 'twelfhynde' and 'sixhynde' were originally applied to captains of 120 and 60 men (a supposition which in face of the well-known weregild system seems needless and wholly unsupported); he holds that the 'gesíth' was originally a captain or officer developing into a local prefect of police; that as 'the township is the settlement of the freemen, the rank and file of the conquering nation, the vill is . . . the seat of their captain as territorial lord. And what the lord was in his village or his batch of villages the king was over the nation.' Again, 'the "gesíth" was plainly subordinated to the Hundredes Ealdor, and that functionary was his immediate ealdorman.' This theory is one (though the direct evidence for or against it must be extremely scanty) well worth discussion, and it must be admitted that the importance of the old English military organization (while acknowledged to lie at the base of the hundred) has hardly been taken into

account in the investigations which touch the lesser organic constitutional units. As it stands, that part of the reasoning which rests upon the idea of a 'gesíth' as an 'officer' will certainly need modifying.

The language, Latin and English, of the documents and the contractions used are also briefly but helpfully treated in the Introduction.

There are a few points on which one would venture to differ from Professor Earle,—his condemnation of 'twyhynde,' his estimate of 'Asser,' his etymologies of 'Hwætmundesstán' (noticed already in print by Mr. Stevenson), and 'ciric.' Mr. Round's paper in vol. i. of the Domesday Papers gives a better account of the hide than Eyton's; Professor Rhŷs has settled the Bretwalda question in a most satisfactory way in his admirable little book on Early Britain; and Steenstrup has in his Danelag (vol. iv. of Normannerne) an interesting discussion of the 'siþesocn.' On the other hand, there are numerous valuable little contributions to legal etymology and the history of place-names, such as the notes on 'stapol,' 'crundel,' 'stoccen,' which cannot be noticed here.

In a second edition the age of every original document or copy should be stated as part of the title, so far as can be ascertained, and the place which it concerns should also be added as heading. This would greatly abridge the labour of getting at the real weight of the document one happens to be looking at, a process which, when all that is already known is supplied, is sometimes not a very easy one. It would also possibly put an end to such absurd and curious hypotheses as the wholesale forgery fancy of Mr. Gomme.

It was out of the question in this volume to supply maps, but it is well to note that for the Cartularium, now getting towards completion, maps are almost a matter of necessity.

Mr. Plummer has rendered the Professor good service in seeing the book through the press, and as far as I have been able to test it, the text is singularly correct.

F. Y. P.

Traité de Droit commercial. Par Ch. Lyon-Caen et L. Renault. 2e édition. Paris: F. Pichon. 1889. Tome premier.

The first edition of this work appeared under the title of *Précis de Droit commercial*, in two volumes, and was intended for students. It missed its purpose. It took, however, a first, if not the first, place among existing treatises on modern French mercantile law as a work for the use of the legal profession, and the authors had subsequently to publish a *manuel* to carry out their original object. The new edition, judging by the first volume of it, will practically be a new work, and if continued on the scale of this first volume, it will occupy a number of portly tomes.

The present instalment treats of the distinction between commercial and civil actions and the characteristics which determine the jurisdiction of the tribunals of commerce and of commercial institutions, viz. these tribunals of commerce, conseils de prud'hommes, chambers of commerce, and consuls.

An excellent innovation as regards tables, in which modern French writers are wont to show an inexplicable carelessness, is made by MM. Lyon-Caen and Renault. They index the volumes as they appear, and add a table of texts with references to where treated. The authorities and practice moreover, which many French legal writers find it convenient to replace by their own intelligent and reforming criticism of the texts, are here treated in something like the same spirit as that in which an English writer would treat them. Case-law, we must explain, does not in principle exist in France. Past decisions have no binding effect on future ones, and even the

Court of Cassation can vary its decrees as it lists. In practice, however, precedents do have their weight, and the art of arguing a point of law is very much in France, as in England, a matter of citing past decisions. Without this explanation English readers would be puzzled by such a paragraph as the following from the Preface:—'La jurisprudence (i. e. past decisions) a une grande importance dans toutes les branches du droit. L'étude du droit positif ne doit pas rester dans les abstractions; il faut le voir dans son application aux faits qu'il est destiné à régir, sans quoi les idées risquent d'être obscures et confuses. De plus, les raisons donnée pour motiver l'application ou la non-application d'une règle dans tel cas donné, éclairent le sens et la portée de la loi. Le jurisconsulte doit donc étudier les décisions judiciaires intervenues à propos des textes dont il cherche à déterminer la signification exacte' (p. vii). T. B.

The Trustee Acts, containing the Trustee Act 1850, *the Trustee Extension Act* 1852, *and the Trustee Act* 1888. By GAWAYNE BALDWIN HAMILTON. London: Stevens & Sons, Lim. 1889. 8vo. xix and 144 pp.

THIS is a very useful little book. We have perused it with much care, and we have come to the conclusion that it may be safely trusted to as a guide to the complicated law to which it relates. In a review, L. Q. R. iv. 353, of Mr. Hamilton's treatise on 'The Law of Covenants,' we said that that book was full of promise, but we objected to a carelessness of diction. We are glad to say that the author has made a great advance in the book that we are reviewing; he has clearly paid much attention to accuracy of language.

The author has 'endeavoured to give the cases sufficiently at length for it to be seen whether they are in point, so that loss of time by looking out cases dealing with a different subject-matter may be avoided,' and we think that he has succeeded. According to the modern and useful practice, references are given in the table of cases to all the Reports. Almost every case of importance is cited. Perhaps *Re Blaine's Trusts*, W. N. 1886, 203, might have been cited at p. 24 with advantage. Probably however the author designedly omitted that case as being reported in the Weekly Notes only. The book contains a good index.

The profession are perhaps too much in the habit of neglecting small books, but the usefulness of a book does not depend upon its size; a concise and carefully written treatise is often of much greater use to a busy lawyer than a large book, and we feel certain that Mr. Hamilton's book only requires to be known to be appreciated. H. W. E.

A Digest of the Law of Carriers of Goods and Passengers. By WALTER HENRY MACNAMARA. London: Stevens & Sons, Lim. 1888. La. 8vo. xxxi and 580 pp.

THE author of this work has taken considerable pains to arrange and digest the statute and case law relating to Railways as carriers of passengers and goods; and particularly the decisions of the Railway Commissioners, which are here made accessible in a convenient form. If he had confined himself to this object, he would have furnished a satisfactory volume of modest dimensions. But in extending his field to embrace the general law of carriers, he has used material of existing standard authorities in a manner neither judicious nor candid. This is a serious charge which must be

exactly substantiated, and an analysis of some consecutive pages is accordingly subjoined.

Chapter IX is headed, 'The rights and duties of the vendor and vendee of the goods in relation to their conveyance by a carrier;' and the subject is divided into two heads,—'1. *Generally*; 2. *Stoppage in transitu*.'

Under the first head the author commences (p. 103, Art. 129) as follows:—

'The delivery of goods by the vendor to a common carrier, for the purpose of transmission by the vendee, will, in the absence of any special arrangement, and where the contract is otherwise binding, amount to a delivery to the vendee, so as to vest the property of the goods in him.'

This appears original; but is obviously inaccurate as a general proposition so far as relates to the vesting of the property.

The next paragraph requires a different comment. It is:—

'Where the vendor is bound to send the goods to the purchaser, the delivery of the goods to a common carrier, *a fortiori*, to one specially designated by the purchaser, for conveyance to him, or to a place designated by him, constitutes an actual receipt by the purchaser (*Dawes* v. *Peck*, 8 T. R. 330; *Cusack* v. *Robinson*, 30 L. J., Q. B. 261; *Smith* v. *Hudson*, 34 L. J., Q. B. 145; and judgment of Lord Cottenham, in *Dunlop* v. *Lambert*, 6 C. & F. 620; Blackburn on Contract of Sale (2nd ed.), p. 246).'

Here the passage 'the delivery ... by the purchaser' is a *verbatim* reprint of a passage in Benjamin on Sale, 2nd ed. p. 135 (4th ed. p. 164), where that author is dealing with *actual receipt* under the Statute of Frauds. The statement in Benjamin, though questionable, is quite intelligible. Prefaced as it is in Mr. Macnamara's book by the words 'where the vendor is bound to send the goods to the purchaser,' it is difficult to understand what is meant by 'actual receipt.' The words cannot relate to the Statute of Frauds; for, on the hypothesis, *cadit quæstio* as to the Statute. Nor can it be *actual receipt* in the sense of terminating the *transitus*. If nothing is meant by 'actual receipt' but that the goods are in law *delivered*, the words are inappropriate. Turning, however, to another page of Benjamin, 2nd ed. p. 572 (4th ed. p. 702), we find the identical clause 'where the vendor is bound to send the goods to the purchaser,' introducing a passage similar to Mr. Benjamin's former statement as to the delivery of goods to a carrier, but somewhat abbreviated, and with the important difference of substituting for the words 'an actual receipt by the purchaser,' the words 'a delivery to the purchaser himself.' It thus appears that the passage in Mr. Macnamara's text is formed by a misjoinder of the two sentences in Benjamin; showing a curious want of skill in the use of the scissors and paste.

Further comment is unnecessary. But to prove that the above is not a solitary instance of the *modus operandi*, the analysis must proceed. The next sentence commences with a new line, and is in smaller type:—

'In such cases the carrier is, in contemplation of law, the bailee of the person *to* whom, not *by* whom, the goods are sent, the latter in employing the carrier being considered as an agent of the former for that purpose.'

This is *verbatim* Benjamin, in continuation (without break of line) of the passage (2nd ed. p. 135, 4th ed. p. 164) already excerpted. Mr. Macnamara, six lines further on, says:—

'It must not be forgotten that the carrier only represents the purchaser for the purpose of *receiving*, not *accepting*, the goods.'

This is *verbatim* Benjamin, immediately following the last-mentioned passage (2nd ed. p. 135, 4th ed. p. 164). Mr. Macnamara's book continues (p. 104) with ten lines, beginning 'If the reason' and ending 'purchaser (see Blackburn on Contract of Sale, 2nd ed. p. 140).' There are no marks

of quotation. The passage is *verbatim* Blackburn, in the place cited. The next three lines—'If the vendor . . . vendor's agent'—are, omitting a conjunction and auxiliary verb, *verbatim* Benjamin, 2nd ed. p. 572 (4th ed. p. 702). Then follow fourteen lines in large print, of which the last sentence has a verbal similarity to Addison on Contracts (8th ed. p. 923), and suggests that this work should have been referred to as the authority. And then follows a paragraph of twelve lines in small print (p. 105), 'An agent . . . destination,'—with a reference, half-way down,—'see Addison on Contracts, 8th ed. p. 962.' The whole passage is (omitting a short explanatory clause) *verbatim* Addison, from the place cited;—though it is true the last three lines, both in Addison and in Mr. Macnamara's book, are nearly in the words of the report of *Dixon* v. *Baldwin*, which is cited in both. Three lines further on (pp. 105–6) is a paragraph of eight lines in large print, concluding with the reference in parentheses, 'Addison on Contracts, 8th ed. p. 950.' There are however no marks of quotation. The passage is (omitting part of a parenthesis) *verbatim* Addison. Then follow eleven lines in small print—'The delivery . . . *in transitu*.' This passage is *verbatim* Addison, in continuation of the passage copied in large print and so far acknowledged by the citation above mentioned. This last passage is given without any citation of or reference to Addison. The *cases* incorporated as references in the text are referred to in the foot-notes of Addison.

And so on. The list is by no means exhausted.

We are willing to believe that Mr. Macnamara has erred in pure ignorance of the common usages of literary courtesy, not to say literary honesty and the law of copyright. But then people who are in such a state of ignorance ought either to learn to know better or to abstain from writing books.

Railway Rights and Duties: a Summary of the Law relating to a Railway in operation. By James Ferguson. Edinburgh: William Green & Sons. 1889. xxv and 402 pp.

This book, which is the work of a Scotch lawyer and is mainly intended for Scotch readers, deals very fully with the rights and liabilities of Railway Companies as owners of their line and carriers upon it, the English and Irish being dealt with as well as the Scotch cases. We have been disappointed in not finding a defence of *Wanman* v. *Scottish Central Railway Company*, 38 Jur. 404, as against the conflicting English case of *Parkinson* v. *Great Western Railway Company*, L. R., 6 C. P. 544, and are surprised at Mr. Ferguson missing the distinction between *Evershed's Case*, 3 App. Cas. 1029, and the *Denaby Main Case*, 11 App. Cas. 97, on the point whether an action lies to recover overcharges, the law surely being before the Act of 1888 that no action lay under the Act of 1854, but that it lay under the Act of 1845, whereas Mr. Ferguson appears to think that the *Denaby Main Case* overruled *Evershed's Case*. The lawyers of all the three countries however will derive benefit from a perusal of the sections upon bye laws and level crossings, as well as from other parts of the book. We think it was a mistake not to have waited for the Rules of the new Commission, and not to have printed more sections than one (the 83rd or 'equality clause') of the Scotch Consolidation Act, in the Appendix of Statutes. A digest of cases upon 'other' branches of Railway Law decided in the Scottish Courts since 1873, when Mr. Deas's 'Law of Railways applicable to Scotland' was first published, follows the principal pages of the book, the value of which it will much enhance, though it is a mere digest without note or comment; whereas in connection with one case at least (p. 281) on which the 'Valuation Appeal Court' was divided in

opinion, we think the readers of the book may fairly complain at being left without guidance from the author to speculate what the law is.

Prideaux's Precedents in Conveyancing; with Dissertations on its Law and Practice. Fourteenth Edition. By FREDERICK PRIDEAUX and JOHN WHITCOMBE. 2 vols. London: Stevens & Sons, Lim. 1889. lvii and 903, and 895 pp.

THE fact that the fourteenth edition of 'Prideaux' is before us is strong testimony to the value and popularity of the book. That a work of these stately dimensions should have passed through fourteen editions in the four decades of its existence is no small thing. There is only one collection of conveyancing precedents besides this the editions of which number more than five, and that is a book on a much smaller scale. The present edition has all the 'latest improvements,' new Acts of Parliament and decisions having been duly added. Considerable changes have also been made, we are assured, in the staple of the work, in the way of rewriting and adding dissertations and adding precedents, notably of wills and bills of sale. Two new dissertations have been written, a short one accompanied by some eight precedents on 'Arrangements with Creditors,' and a longer one, with fourteen very useful precedents, on 'Charity Deeds.' We may take leave to doubt the utility of printing Acts of Parliament such as the Conveyancing and Settled Land Acts in appendices: every practitioner has such statutes as these at his elbow, and he turns to 'Prideaux' not for the Act, but for the cases thereon and a possible interpretation or illustration thereof. In connexion with the Conveyancing Act 1881 we are interested to see how the learned authors of 'Prideaux' deal with the form in which covenants should now be framed, as regards omitting the heirs, executors, and administrators of the covenantor and the heirs, executors, administrators, and assigns of the covenantee. We apprehend that under sects. 58, 59 and 60 of the Act of 1881 these words may as a general rule be considered pleonastic and *A* may covenant with *B totidem verbis*, the form of the old covenant with several persons being reduced to that of a covenant with one person. But Mr. Wolstenholme has pointed out that 'the Act only gives to assigns the benefit of and the right to sue on a covenant, that the obligation of a covenant by a lessee or other person remains incident as before the Act, and the express mention of "assigns" in order to impose an obligation upon them is still necessary in all cases in which it was required before the Act.' If the burden of the covenant is intended to bind property in the hands of the covenantor's assigns, the covenantor should covenant for himself and his assigns. We take it that if *A* the owner of a large close sells part of his close to *B* and wishes so to covenant to build a wall on land which remains to him as to bind both himself and the land, in such case *A* should covenant for himself and his assigns so as to make the covenant run with the land. We have tried in vain to find in the pages of 'Prideaux' a precedent for a covenant intended to be more than a personal one. The nearest approach we can find to it is in the mortgagor's covenant to insure, which is expressed to be one by '*A. B.* that he the said *A. B.* his heirs and assigns will' insure. In all the other instances which have come under our eyes the covenant is expressed as a simple one by *A* with *B*, and *A* does not in any case that we have found covenant for his assigns. The point is a small one, but not without its importance. In most of the small things and in the great things 'Prideaux' is unexceptionable. It has a high reputation, which it will not lose while it remains in such good hands as those of Mr. Prideaux and Mr. Whitcombe.

The Law of Tithes and Tithe Rent-charge. By EDWARD FAIRFAX STUDD. London: Stevens & Sons, Limited. 1889. Sm. 8vo. viii & 147 pp.

THIS is a neat and a modest little book, aspiring to give an account of the history and present position of the law of tithe and tithe rent-charge in a popular form. Mr. Studd does himself injustice in saying that he has treated the history and the old law of tithes superficially. His sketch of the characteristics of tithes prior to the Commutation Acts is concise, but we should not have called it superficial. And his statement of the present position of tithes is, as far as it goes, accurate and trustworthy. The staple of the book is concerned with commutation and apportionment under the Act of William IV, and the shorter chapters deal with the various subjects of charges upon the rent-charge, of alterations of apportionments, of the discharge of land from its tithe burden either by giving land in lieu thereof or by merger, of the redemption of tithes and tithe rent-charge, of the remedies of the tithe owner, and, lastly, of extraordinary tithe rent-charge. Mr. Studd's statements of the law are clear and good, and his work as a whole deserves commendation. We hope that opportunity will be given to supplement it with a table of the Acts of Parliament cited, to complete the table of cases with the dates of each decision, and to add one or two more references to judgments of recent years. We can understand why Mr. Studd preferred to omit any mention of *Walsh* v. *Trimmer* (L. R., 2 H. L. 208) in his chapter on extraordinary tithe, but we are at a loss to know why he has ignored the decision of Vice-Chancellor Bacon in *Bailey* v. *Badham* (30 Ch. D. 84), in which for the first time in the half-century of the Tithe Act's life a judge was asked to say that when the Act substitutes a rent-charge for the existing modes of compelling payment of tithe, then such a rent-charge is a charge upon the inheritance. The Vice-Chancellor's characteristic refusal to do this thing would have been worth noticing.

A Digest of the Law of Uses and Profits of Land. By STEPHEN MARTIN LEAKE. London: Stevens & Sons, Lim. 1888. 8vo. xliv and 603 pp.

THIS volume, although complete in itself, is in fact the third part of a series in which the very learned author proposes to include the whole of the law of England relating to land. A former volume, issued in 1874, contained the first two parts of this series; and treated of the sources of the law, and of estates in land. The fourth and fifth parts, when they appear, will deal with the transfer of property in land, and with the law of persons as affecting property in land. The volume now before us, the third part of this series, deals firstly with timber, minerals, game, fisheries, water, and other heads of law relating to the manner in which the ownership of real property may be converted into the use and enjoyment thereof; and secondly, with easements, profits à prendre, rents, and other rights which represent burdens upon the property of another.

To those who are acquainted with Mr. Leake's Digest of the Law of Contract, it is probably superfluous to say that the present volume is characterised by the same accurate and pregnant conciseness with which they must be familiar. The student will find it a sort of intermediate work between 'Joshua Williams' and the larger treatises which deal separately with the different heads combined in this volume.

But Mr. Leake has a far higher aim, which is nothing less than to make the series, of which this volume is a part, a scientific and logically arranged

digest of our real property law, which may prepare the way for a code on the subject. His idea is, that for this purpose the law must be treated not so much from the historical point of view as upon a basis of scientific order and arrangement. If anybody can carry out this idea, it is Mr. Leake himself. But whether the end when attained will be half as valuable as the means which he has here provided for attaining it, is a point on which we may be permitted to have our own opinion:—assuming, which is a large assumption, that any considerable improvement in the form of this branch of the law can be effected without much prior simplification of the substance.

Elements of the Law of Torts. A Text Book for Students. By M. M. Bigelow. Cambridge University Press. 1889. xxx and 374 pp.

This, apparently the latest product for the time being of Mr. Bigelow's amazing industry, comes to us at a late moment. It is a new version of the well-known little book which in its original American guise has been before the public these ten years, a version designed for English students, the appearance of which seems due to the fact that the book had already 'found favour in the instruction of the Law School of the University of Cambridge.' Mr. Bigelow has before now had good cause of complaint against English book-makers, and we are therefore very glad to see an English edition of his work which is prepared by him and issued in his name. The merits of the book in its American form are well known. 'The present,' he says, 'differs from the American edition in that it is a book of the law of England instead of the law of America. American cases are, indeed, cited here and there; but that has always been done with a view to throwing light upon the student's work. In the changes made, English authorities and illustrations have been substituted very generally for American, and the English statutes have been referred to wherever they fall within the compass of the book.' The considerable changes rendered necessary partly by lapse of time, partly by change of venue, seem to have been made with care and judgment. The learned collector of the Placita Anglo-Normannica keeps himself well read in the current English law reports and does not allow himself to fall behind the times. We believe the book to be a very good book for beginners. It is of course possible to regret that its writer says very little about torts in general, gives us no general part, but after a very brief introduction, and even this is a new feature in the new edition, at once attacks the particular torts, deceit, malicious prosecution and so forth. But the generalities of the law can be found amply discussed in other books, while those who have been practically engaged in the attempt to teach law to 'the young,' that is to such as have had little experience of the world of business and litigation, will know that discussions of general principles are apt to be very unmeaning to their pupils. The middle axioms about slander and libel, assault and the like, came first in the development of the law, and they have to come first in legal education. It is with these that Mr. Bigelow deals, and he deals with them in a simple, lucid, straightforward way.

Principles of the Law of Succession to Deceased Persons. By T. Radford Potts. London: Stevens & Sons, Lim. 1888. 8vo. xxiv and 285 pp.

Mr. Potts has chosen an interesting subject, and he has made a strenuous endeavour to bring the rules of English law within the limits of a more or

less scientific plan, borrowed mainly from Holland's Jurisprudence. But the author's knowledge of property law does not appear to extend very far beyond the ordinary text-books; and the defects of his work are somewhat serious. On p. 26 for example the definition of burgage tenure as 'socage tenure of land in towns' is defective and, in a book intended for students, must be regarded as misleading. On p. 21 the terms 'limitation' and 'purchase' are transposed in a very strange manner; but this may be a clerical blunder. On p. 44, under the general heading of Life Interests in Real Property, occurs the remarkable statement that a tenant in tail 'has practically only a life interest in the property, unless he bars the entail.' It is true that even an owner in fee cannot exercise his rights after he is dead; but this undeniable fact hardly justifies Mr. Potts in treating a fee tail as a life interest. On p. 55 the term 'duty' is defined as 'the general liability to respect rights *in rem*.' In offering this definition, Mr. Potts is careful to explain that he is not following Austin; but his explanation does not atone for the confusion which is always caused by putting an arbitrary sense on a familiar term. It would be easy to add to these critical observations; but the specimens we have given may suffice to show that this treatise must undergo a very thorough process of revision before it can safely be recommended to students.

Supplement to Carpmael's Patent Laws of the World. Edited by a Committee of Fellows of the Institute of Patent Agents. London: W. Clowes & Sons, Lim. 1889. 8vo. 243 pp.

The principal work to which this is a supplement was reviewed in the April number of the Law Quarterly, 1885. By the aid of the supplement the original work is completed and brought up to date. The most noteworthy addition relates to Switzerland, which has at length adopted a Patent Law commencing on the 15th of November, 1888. The subject-matter is 'New inventions applicable to industry and represented by models.' The other conditions are of the usual nature. The principle of compulsory licence is adopted in favour of the proprietors of patented improvements; the privilege being reciprocal.

There is a new Act for India (No. 5 of 1888.—The Inventions and Designs Act, 1888), which is here set out so far as it relates to patents for inventions. It repeals the former Act (No. 15 of 1859). Since the date of the former work, patent law appears to have extended into (besides Switzerland) Borneo, Congo, Ecuador, Orange Free State, Peru, and South African Republic. Amending Acts for various other countries are furnished; and one apparent omission, a law of Bolivia dated 1858, supplied.

A Handbook for County Authorities. By Alexander Pulling, Jun. London: W. Clowes & Sons, Lim. 1889. 8vo. xii and 309 pp.

Handbooks of this class may be written upon either of two different plans. One plan is to set out the statutes relating to a subject and to add full explanatory notes. This plan gives the best chance of precision, and is therefore most advisable in a work to which lawyers have to refer; but for reasons which will be patent to all who know anything about our legislation a book written upon this plan is almost unintelligible to a layman. Such books in everything but length generally resemble the book which pretty Vivien threatened to read. In that book only Merlin could read the commentary and Merlin himself could not read the text. The other plan is not to reprint the Acts nor to write long notes, but to state everything of

importance in a plain concise style adding at the foot of each page the more important references. This plan does not admit of the highest accuracy, but if carefully executed it produces a book far more instructive to laymen and far more likely to be used by them. Mr. Pulling has followed this plan, and has made a very good handbook. Within the compass of a small volume and in comfortably large type he has given an account of the organization and administration of the county which is full and clear. Legal and technical language has been for the most part avoided, and where used it has been explained. Should any reader feel desirous of becoming further acquainted with county government he will find numerous references both to statutes and to reported cases. He is not forced to rely upon his author; but his author has not prematurely vexed his soul with questions of interpretation. Certain branches of local administration which most writers have slurred over are treated in this volume with commendable diligence. Upon Weights and Measures, for example, Mr. Pulling gives much useful information. Amongst other things he reminds us that two-thirds of the weights and measures now mentioned in books of arithmetic are obsolete, and that the use thereof is expressly forbidden. The present volume treats only of those powers of the London Council which it has in common with other councils. Mr. Pulling promises a second volume devoted entirely to the Metropolitan authorities and on the passing of the District Councils Bill a third volume dealing with District Authorities.

A Handbook to the Office of Magistrate. By HAROLD WRIGHT. London: W. Clowes & Sons, Limited. 1889. Sm. 8vo. viii and 90 pp.

IN a small volume of seventy-four pages of good bold type, with tables of contents, of cases, of statutes referred to, and a complete index, the office and duties of a Magistrate as a Justice of the Peace are here fully explained. It could not well be shorter, and it would be difficult to make it better. Very good advice is given on evidence and on punishments, often much required. The question of costs is touched upon. Costs fall very heavily on poor people. Magistrates may therefore, even in bad cases, inflict a very small fine, one shilling, and costs, the combined sum amounting to a heavy punishment. This may in part, though not altogether, explain the complaints made from time to time of the apparent inadequacy or inequality of sentences. On the other hand, inexperienced magistrates may inflict a small fine with costs in a trifling case, without considering that the costs will practically make the sentence far too heavy. A shilling fine may entail twenty-five or thirty shillings in costs. As every witness adds to the costs, defendants often plead guilty, or omit to call material witnesses. The method of appropriating fines and costs should be altered, and Magistrates should fine according to the offence and circumstances without costs. In case of reckless accumulation of costs they could easily adjust the fine to cover them. Mr. Wright's remarks at p. 67 are much to the purpose. On p. 71 we see an ugly misprint—*animadverta* for *animadvertenda*—which we hope there will soon be an occasion to amend.

The Law of Distress, with an Appendix of Forms, Table of Statutes, etc. By ARTHUR OLDHAM and A. LA TROBE FOSTER. Second Edition. London: Stevens & Sons, Limited. 1888. lxiv and 582 pp.

THE Law of Distress Amendment Act, 1888, with its Distress for Rent Rules, and the County Courts Act 1888, with its Replevin and other Rules, have made a second edition of this work almost a matter of necessity, and

we are glad to find that the authors have been equal to the occasion, though it is unfortunate that they have not been able to notice the very important Preferential Payments in Bankruptcy Act 1888, which so extensively restricts the rights of a distraining landlord in favour of clerks, labourers, and other preferential creditors. The clumsy Law of Distress Amendment Act is fully treated and effectively criticised, but the authors merely mention without solution the curious question whether the bedstead is included in the 'bedding' which the Legislature has so considerately exempted from distress by that Act. *Masters* v. *Green*, 20 Q. B. D. 807 and the other recent cases are duly noted with references to all the current reports, but the effect of *Re Willis*, 21 Q. B. Div. 384 (now under appeal to the House of Lords) upon 'attornment clauses' is not quite sufficiently brought out.

We have also received :—

Studien zur Rechtsphilosophie. Von RICHARD WALLASCHEK. Leipzig: Duncker und Humblot. 1889. 8vo. 332 pp.—Dr. Wallaschek's book is too remote, perhaps, from English legal habits of mind to find many readers among our profession in this country. Students of political and social philosophy might, on the other hand, find stumbling-blocks in its constant assumption of technical knowledge. Nevertheless we commend it to the minority whom the name of 'Rechtsphilosophie' does not frighten away. There is much ingenious dialectic, many fresh and suggestive ideas: for example, the argument that the 'person' of legal science is not, even in the case of an individual thing, identical with the physico-psychological person, nor the 'thing,' even in the case of corporeal things, with the material object of sense. It is amusing to find, while efforts are being made to acclimatize the Kantian and post-Kantian transcendental jurisprudence in these kingdoms, that Dr. Wallaschek boldly speaks of it as dead and buried ('des seligen Naturrechtes'), and says, as Professor Holland has already said here, that the best philosophy of law is to be found, not with the philosophers, but in the 'General Part' of the systematic jurists.

Loi anglaise sur la faillite du 25 août 1883. Traduite et annotée par CH. LYON-CAEN. Paris: à l'Imprimerie Nationale. 1888. La. 8vo. lxxxvii and 212 pp.—Frenchmen used to be reproached with knowing less of foreign institutions than any other nation, except perhaps Englishmen. Of late years they have been working hard to take away this reproach, and the school of historians, economists, and lawyers, of which M. Lyon-Caen is a distinguished member, is putting French readers in possession of an excellent collection of materials for comparative study. We may not be over well pleased with our bankruptcy legislation, but an Act which has been translated in Italy, and is now translated with an elaborate introduction by a quite practical-minded French lawyer, is at least an experiment of more than insular interest.

Das römische Recht als Theil des Rechtsunterrichtes an den englischen Universitäten. Von ERWIN GRUEBER. (In 'Deutsche Zeit- und Streitfragen' series.) Hamburg. 1889. 8vo. 52 pp.—Dr. Grueber's experience, now of seven years, as Reader in Roman Law at Oxford, has led him to discover more good points in English academical methods than most Continental observers would be likely to admit on a first inspection. The want of systematic order in the Oxford law school is not an unmixed evil. The first-hand study of the Roman texts is more effectually insisted on than is the case in the methodical German course of 'Pandects.' The average standard of work may not be very high, but the man who does take his work seriously is led

to think and work for himself. And the instruction given in 'General Jurisprudence' goes far to supply the absence of a 'General Part' in English text-books and lectures on Roman Law. Then Dr. Grueber has much good to say of the method and quality of our examinations, especially the Oxford examination for the B.C.L. degree, though he admits that the number is excessive. His pamphlet has the practical object of recommending the features he thinks best in the English system for consideration and adoption (of course with necessary modifications) in German Law Faculties.

Cours de droit international public. Par AMANCIO ALCORTA. Edition française avec une introduction par ERNEST LEHR. Tome 1er. Paris: Larose et Forcel. 1887.—The author of this work is Professor of International Law at the University of Buenos Ayres, and his book was originally written for local use. In his introduction, Mr. Lehr gives the reader to understand that we may expect in M. Alcorta's treatment of the subject a departure from the notions received in Europe, and that in this respect he is the mouth-piece of South America, which has the right 'terre vierge et jeune, d'avoir sur bien des questions internationales, des opinions différentes des nôtres et de faire entendre sa propre voix dans le concert des savants du monde.' M. Alcorta in his preface himself remarks that American statesmen have committed mistakes entailing disastrous consequences by accepting without examination 'ce qu'ils trouvaient appliqué ou susceptible d'une application constante de l'autre côté de l'Atlantique' (p. 11). This is repeated at p. 374, where some instances are given of the departures from received notions referred to. These in the author's words are as follows:—'Le droit acquis aux colonies de se rendre indépendantes et de former des Etats souverains, ainsi que l'obligation de les reconnaître, quand elles ont une organisation stable, quelle qu'elle soit; la doctrine de Monroe d'après laquelle les Etats européens ne sont pas admis à intervenir et à changer la forme des gouvernements américains; la reconnaissance absolue de la liberté de navigation sur les rivières, et du principe qu'il n'y a pas dans la limite des Etats de territoires *res nullius* et que les îles baignées par leurs mers dépendent d'eux; l'application des principes du droit international aux guerres civiles quand les parties en lutte offrent les caractères que l'on exige des Etats pour figurer en cette qualité; et la non-responsabilité des Etats pour les préjudices causés aux habitants par suite des guerres civiles.'

As the first volume is devoted to a sort of historical and literary introduction, it is only by the volumes to come that we shall have an opportunity of judging the author's treatment of these matters.

American Constitutional Law. By J. I. CLARK HARE. 2 vols. Boston: Little, Brown & Co. 1889. La. 8vo. lxxxi and 1400 pp.

The Investment of Trust Funds, incorporating the Trustee Act, 1888. By E. A. GEARE. Second edition. London: Stevens & Sons, Lim. 1889. 8vo. xxiv and 264 pp.

The Complete Annual Digest of every Reported Case in all the Courts, for the year 1888. Edited by ALFRED EMDEN. Compiled by HERBERT THOMPSON, assisted by R. T. GILL. London: W. Clowes & Sons, Lim. 1889. La. 8vo. lxxxvi pp. and 480 cols.

History of Co-operation in the United States. John Hopkins University Studies. Vol. VI. By E. W. BEMIS, ALBERT SHAW, AMOS G. WARNER, C. H. SHINN, and D. R. RANDALL. Baltimore: N. Murray. 1888. 8vo. 540 pp.

A Digest of Civil Law for the Punjab. Chiefly based on the customary Law as at present judicially ascertained. By W. H. RATTIGAN. Third Edition. Allahabad: *Pioneer* Office. 1888. La. 8vo. xxx and 136 pp.

The Land Charges Registration and Searches Act, 1888, being an Appendix to On Searches. By HOWARD W. ELPHINSTONE and J. W. CLARK. London: W. Maxwell & Son. 1889. 8vo. 48 pp.

The Medical Jurisprudence of Inebriety, being papers read before the Medico-Legal Society of New York and the Discussion thereon. Edited by CLARK BELL. New York: Medico-Legal Journal Association. 1888. 8vo. viii and 183 pp.

A Selection of Cases on the Law of Quasi-Contracts. By W. A. KEENER. 2 vols. Cambridge (Mass.): C. W. Sever. 1888. La. 8vo. xv and 541, iv and 658 pp.

A Sketch of the Criminal Law. By W. S. SHIRLEY. Second edition. By C. S. HUNTER. London: Stevens and Sons, Lim. 1889. 8vo. xvi and 164 pp.

The Patents Designs and Trade Marks Acts, 1883 *to* 1888. By LEWIS EDMUNDS. London: Stevens & Sons, Lim. 1889. La. 8vo. 86 pp.

The North of England Law Magazine. Published quarterly at Leeds.

Die Ungültigkeit obligatorischer Rechtsgeschäfte. Von OTTO GRADENWITZ. Berlin. 1887. 8vo. ix and 246 pp.

Interpolationen in den Pandekten. Von OTTO GRADENWITZ. Berlin. 1887. 8vo. xi and 328 pp.

The County Courts Act, 1888, with Introduction, Tabular Indices to Consolidated Legislation, Notes, and an Appendix to the Act. By G. PITT-LEWIS, Q.C., M.P. London: Stevens & Sons. 1888. La. 8vo. xxxv and 104 pp.

The American and English Railroad Cases. Edited by WILLIAM M. MCKINNEY. Vol. XXXIII. Northport, Long Island, New York: E. Thompson & Co. 1888. 8vo. v and 724 pp.

Introduction au Droit International privé, &c. Par ARMAND LAINÉ. Vol. I. Paris: F. Pichon. 1888. 8vo. xxi and 433 pp.

Department (County) Councils, Local Management and Taxation in France. By THOMAS BARCLAY. London: Stevens & Sons. 1888. 8vo. 20 pp.

Assimilation des lois concernant la lettre de change, le billet à ordre et le chèque sur la base du projet du Congrès international de droit commercial. Par THOMAS BARCLAY. Paris: G. Pedone-Lauriel. 1888. 8vo. 40 pp.

La Sociologie: Discours prononcé à la séance de rentrée de l'Université de Bruxelles. Par E. VAN DER REST. Bruxelles: Gustave Mayolez. 1888. La. 8vo. 39 pp.

La Question des Passeports en Alsace-Lorraine. Par EDOUARD CLUNET. Paris: Marchal et Billard. 1888. 8vo. 55 pp.

De l'application de la loi française aux négociations à l'étranger de titres au porteur perdus ou volés. Par RENÉ VINCENT. Paris: L. Larose et Forcel. 1888. 23 pp.

The Principles of Estoppel: An Essay. By MICHAEL CABABÉ. London: W. Maxwell & Son. 1888. 8vo. xi and 152 pp.

Storia del Diritto Privato Romano. Per PIETRO COGLIOLO. Vol. I. Firenze: G. Barbèra. 1889. Sm. 8vo. 274 pp.

NOTES.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

In the Medico-Legal Journal for September 1888, Mr. Clark Bell discusses with fulness and ability the recent 'judicial departure' from *the rules in Macnaghten's case*. The subject is ripe for reconsideration; and the following points, to some of which Mr. Bell does not call attention, seem to deserve prominence. 1. Had the House of Lords any legal right to propound the notorious 'questions'? 2. Were the judges under any legal obligation to answer them? 3. If there is any 'law' in England as to the criminal responsibility of the insane, is it not to be found in the ruling—hitherto unreversed by any court of competent jurisdiction—of Chief Justice Kenyon on the trial of Hadfield? 4. Even assuming the *rules in Macnaghten's case* to possess the authority of law, do they exclude the judicial recognition of *non-delusional* insanity as an exculpatory plea in criminal cases? 'Test their elasticity'—after the manner of Dr. Newman with the Articles—and it is arguable that they offer no safeguard whatever against the pestilent theories of irresponsibility—generated by French alienists in the electric atmosphere of the Revolution. Probably if the *rules in Macnaghten's case* were regarded—as the language of the judges seems to warrant—not as fixed and exhaustive definitions, but merely as rough and approximate criteria of punishable insanity, the increasing, and not altogether groundless, agitation against them might be allayed. No man who has studied the *causes célèbres* of France will seriously recommend us to evade the difficulty of defining responsibility in mental disease under the cloak of a few general terms. A. W. R.

A member of the Selden Society sends us the following note:—

Mr. Pike in his paper in the January number of this REVIEW on the Livery of Incorporeal Things is going too fast. He appears to think that because the word 'seisin' may be applied to things incorporeal, therefore they are susceptible of 'feoffment' and of 'livery.' Can he be forgetful of the fact that whereas the proper legal expression for corporeal hereditaments was and is '*seised* in his demesne as of fee,' the corresponding expression for incorporeal hereditaments is '*seised* as of fee and right'? We have no difficulty in thus using the word 'seised' of things which unquestionably 'lie in grant.' Many of Mr. Pike's citations depend for their relevancy entirely on the use of the word 'seised,' which really does not involve feoffment or livery.

He seems sometimes to attach importance to the difference between the words 'dare' and 'donare,' as if the one meant necessarily a feoffment, and the other a grant. But since both words are used on p. 39 with reference to the same transaction (the case of the Prior of Markeby), he probably would not adhere to this argument. On the same page Mr. Pike's rendering, '*it was to the interest* of a layman to give the advowson and not the church,

makes nonsense, and is an extraordinary, even if natural, translation of the words '*laici interest*,' which should of course have been translated 'it was the province of a layman to give,' &c.

Mr. Pike (p. 32) cites Co. Litt. 142 as showing that Coke recognised that one rent or service might issue out of another; but the passage proves nothing of the kind. It only shows that on a feoffment and subinfeudation before the statute *Quia emptores* a rent might be reserved on each transaction, as well as (what goes without saying) other services.

That there might be a feoffment of common, Mr. Pike says (p. 33), is proved by the Statute of Westm. 2: 'Si quis clamat communiam pasturae per speciale *feoffamentum* vel concessionem ad certum numerum averiorum, vel alio modo quam de jure communi habere deberet, cum conventio legi deroget, habeat suum recuperare quale habere deberet per formam concessionis sibi factae.' It may be so; but one cannot help pointing out that the reference to 'de jure communi' is in fact a reference to common appendant, which of course would be granted together with land, by feoffment; and that all the statute meant was that if in such a case the common is specially limited, instead of being regulated by tenancy and couchancy, the limitation shall have effect. If so, the passage cited does not involve the grant by feoffment of a right of common in gross, as to support Mr. Pike's argument it ought to do.

Mr. Pike certainly confounds the seisin which is necessary for full ownership of a rent (= taking of esplees) with the livery of seisin which he thinks was at one time necessary for the completion of a grant of the rent. The necessity of taking of esplees in order to be seised was discussed in *Orme's case*, L. R., 8 C. P. 281. But this part of Mr. Pike's paper is connected with his arguments based on the use of the expressions 'seisin,' 'seised,' &c., and appears for the reasons before mentioned to be unsatisfactory.

No doubt there is much in the paper which is very suggestive, but his case is not yet proved.

The Queen v. *Clarence*, 22 Q. B. D. 23, illustrates the inherent connection between law and casuistry. It also illustrates the difficulty experienced even by trained lawyers of sound sense in distinguishing between ethical and legal questions. As a matter of law it must appear to most persons to be as nearly certain as can be any matter on which competent judges disagree, that the prisoner Clarence, who communicated a disease to his wife, was not guilty of the definite offence with which he was charged. He did not 'unlawfully and maliciously inflict greivous bodily harm' upon her under sect. 20, he did not make 'an assault' upon her occasioning actual bodily harm within sect. 47 of 24 & 25 Vict. c. 100. To hold that he was guilty of these specific offences would be nothing less than to give a new and strained, and very dangerous construction to well-understood legal terminology. It is also clear that the prisoner committed a grave moral offence. Four eminent Judges were prepared to treat his act as a crime within the meaning of the statute. Is it allowable to suggest that moral indignation deadened for a moment their logical acumen?

The Queen v. *Adams*, 22 Q. B. D. 76, illustrates no less than the *Queen* v. *Clarence* the connection between law and casuistry. It also illustrates the tendency of moral sentiment to disturb judicial calmness. *X* sends *A*, an unmarried woman, a proposal to surrender her honour for money. The letter is never seen by *A*; it falls accidentally into the hands of *B*, who

hands it over to the police. *X* is convicted of having written and published to a young woman of virtuous and modest character a defamatory letter concerning *A* and concerning her character for virtue, modesty, and morality, to the great damage of *A* &c., to the evil example &c., and against the peace. He is in short charged with publishing a defamatory letter or libel. *X* is convicted, and his conviction is upheld by a Court of five Judges. *X* is clearly a scoundrel, and the offence of immoral solicitation ought in any criminal code to be the subject of provisions the drafting whereof would need the most careful consideration. But is *X* fairly held guilty of publishing a libel? He can be held so only on the ground that every insult in writing provokes a breach of the peace, and this in fact is the ground taken by the Court. To judge by the report, no case was cited similar to the one under consideration. The Judges have in effect by a novel extension of a legal fiction created a new crime and have punished immorality as a breach of the criminal law. The expediency of such judicial innovation is open to question. This particular extension of a fiction may lead to some serious consequences.

Dyson v. *Mason*, 22 Q. B. D. 351, taken together with *Bond* v. *Evans*, 21 Q. B. D. 249, makes the liability of publicans for gaming carried on on their licensed premises extremely stringent. Any game, whether of chance or skill, played for money, would under the later case appear to be gaming; whilst the earlier case in date determines that a publican 'suffers' any game to be carried on of which one of his servants has knowledge. If therefore two men drinking at a public house play a game of chess and bet upon the result, the publican is, it would seem, liable to a penalty under the Licensing Act, 1872 (35 & 36 Vict. c. 24), s. 17.

Lucas v. *Dixon*, 22 Q. B. D. 357, determines that under the seventeenth as under the fourth section of the Statute of Frauds, any note or memorandum which is to be available in an action on a contract must have been in existence when the action was commenced. The decision is in conformity with received opinion, and it would have been undesirable to draw a distinction of principle between a memorandum under the fourth, and a memorandum under the seventeenth section. But if the matter were *res integra* there would be much to be said in favour of holding that a memorandum was available as evidence of a contract whether made before or after the commencement of an action. Contracts within the statute are clearly not void. The aim of the enactment is to ensure the production of a particular kind of evidence which may be security against fraud, and it is difficult to see how a memorandum can be the less evidence of a valid contract because of the date at which it comes into existence. The observation of Fry L.J. 'the conclusion at which we have arrived is a somewhat singular one,' is a remark in which everyone will agree.

The Queen v. *The Commissioners of Income Tax*, 22 Q. B. Div. 296. This case is, we should conjecture, likely to be carried to the House of Lords. As it stands it leaves the liability of missionary societies, and like charities, to the payment of income tax in a curious and unsatisfactory position. Whether the rents and profits of lands are devoted to 'charitable purposes,' and therefore within the exemptions provided under 5 & 6 Vict. c. 35, s. 61, Schedule A, appears, according to the view adopted by the majority of the Court of Appeal, to depend on the answer to the inquiry whether the persons for whose benefit the money is spent are rich or poor. A society for

the conversion of rich Hindus cannot, as we understand Lord Esher, but a society for the conversion of poor Negroes can, claim the benefit of the exemption.

'I desire,' said Burke, 'to be governed by law, not lawyers.' There is truth in the taunt. Lawyers, even since the days of Lord Mansfield, have been too apt to apply a Procrustean formula to mercantile as well as political operations. Happily the good sense of modern judges has done much to remove the reproach. Business men may grumble at the law's delay, but they can no longer complain of its technicality or of being confined in the strait-waistcoat of a legal formula. *Lee* v. *Neuchatel Asphalte Co.* (37 W. R. 321) is a good example. The formula which the Court of Appeal was there invited to apply was, that it is ultra vires for a company to pay dividends out of capital, and the company to which it was invited to apply it was a company which had sunk its capital in a lease of an asphalte quarry. The Court of Appeal declined the invitation, and their judgment will meet with the approval of the commercial and legal world. It is one thing, however, to say that such a company is not bound to set aside part of its profits as a sinking fund to replace the wasting assets, and another to explain how this is reconcileable with the doctrine, so strongly affirmed in *Trevor* v. *Whitworth* (12 App. Cas. 409), of the inviolability of a company's capital as the creditors' only security. The answer of the Court of Appeal, which is in substance that the Companies' Acts nowhere prohibit the payment of dividends out of capital, is not quite satisfactory. Of course, in *Trevor* v. *Whitworth* the House of Lords was dealing with a question quite different to the payment of dividends, the voluntary extinguishment by a company of part of its capital by the purchase of its own shares. This was an obvious fraud on creditors, as a prohibited reduction of capital; but the dividends declared by the Neuchatel Asphalte Company were as clearly a return of a portion of the company's capital to its shareholders, and so far a reduction. The truth is that the decision in *Trevor* v. *Whitworth* must be read, like other decisions, *secundum subjectam materiem*, and so read the doctrine of the irreducibility of capital must be qualified in two ways. First, the doctrine only applies to voluntary reduction, not to losses. A company's capital is embarked in its business, and it runs the ordinary risks of that business. If a submarine telegraph company loses one of its cables, and with it half its capital, this is a business loss. Creditors cannot complain or call on the company to make good the loss (*Guinness* v. *Land Corporation of Ireland*, 22 Ch. Div. 375). If a fishery company loses half of its fleet of vessels, the capital is reduced, but in no illegitimate sense. To require a company to replace lost capital before it paid any dividends would, as Lindley L.J. observed, paralyse trade. It is the same with depreciation of a company's property by accidental causes or by wear and tear. Secondly, the doctrine of irreducibility is subordinate to the higher law, the governing principle of these great statutory partnerships, that the contributed capital is subservient to the purposes for which the company was called into existence. If a company is formed, as companies usually are, as the company in *Trevor* v. *Whitworth* was, to carry on a permanent business, the capital is dedicated to such permanent business, and payment of dividends out of capital in such a case is not merely commercially unsound, but legally ultra vires and prohibited. A provision in the articles authorising such payment would be nugatory, as repugnant and self-contradictory. This was what the late Master of the Rolls in effect decided in *Davison* v. *Gillies* (16 Ch. D. 347 n) and *Dent* v. *London Tramways Co.* (16 Ch. D. 344), where the company's articles contained a provision

for reparation of the tramway before payment of any dividend. But there is no rule of law or commerce requiring a company to carry on its business in perpetuity, and if it chooses not to do so its capital need not be permanent. If, as in the case of the Neuchatel Asphalte Co., the capital is contributed to buy and work a particular quarry, the capital must be used for that purpose and nothing else. To compel the company in such a case to keep its capital intact, or rather to form a sinking fund in the nature of a creditors' guarantee fund, would be to compel it to act ultra vires, to divert its capital to purposes other than those for which it was contributed. So where a company is formed to buy and work a patent. The shareholders mean that the money shall be spent in buying something 'quod usu consumitur,' but which in the meanwhile brings in large profits. Each shareholder, if he wants to replace his capital, may form a private sinking fund, but prima facie, i.e. unless the company's constitution provides for it, such a sinking fund is no object of the company, and therefore ultra vires. *Rance's Case* (6 Ch. App. 104), *Re Oxford Benefit Building Soc.* (35 Ch. D. 502), *Leeds Estate Co.* v. *Shepherd* (36 Ch. D. 787), were all cases where there was no real profit earned, but dividends had been declared by the dishonesty of the directors in manipulating the accounts.

Creditors in such a case as *Lee* v. *Neuchatel Asphalte Co.* are not prejudiced, for, in the first place, they must be taken to have read the memorandum and articles of the company they are dealing with; in the next place, they may at any time before the wasting assets are exhausted render them available for payment of their debts by execution or a winding-up order; and lastly, if dividends have been paid out of capital, creditors being unpaid, the liquidator could compel shareholders to refund under s. 101.

The legitimacy of paying brokerage out of a company's funds for placing its shares is analogous. Kay J. has, in *Re Faure Electric Accumulator Co.* (40 Ch. D. 141) declared it, after some hesitation, to be ultra vires. Commercially, brokerage is the mainspring of company formation. Legally, it is difficult to say it is not incidental to a company's business, as an expenditure for getting the co-operative capital which is the *raison d'être* of the company. Advertising the company, printing and circulating the prospectus, are clearly a legitimate expenditure. If a company employed a travelling agent to get subscribers, would such a talking prospectus be ultra vires? Can any logical distinction be drawn between such payments and payments made to a broker to find shareholders? Directors are not to be tied down like trustees. They have the control of the company's funds for the acquisition of gain, and for this purpose a wide discretion in the matter of management. An insurance company, for instance, may pay losses not strictly covered by its policies, because liberal dealing of this sort makes the office popular; so a company may give a bonus to its servants, as an encouragement to serve it well in the future. Brokerage seems really a business expense of this kind. The stress of the argument against it may be put thus: If the undertaking is a sound one, it will float without any artificial aid; if it is not sound, it ought not to be floated at all: brokerage is only paying a clever rogue to take in foolish people. If undertakings could be trenchantly divided into sound and unsound this might be true; but they cannot. Most are on the border line, with elements of success and of failure. Take an example at random, the Invisible Trouser Stretcher Company registered last year. Can any human being say what mystic motives may be at work in the mind of the young man of the period leading him to patronise the invention or not? In these cases brokerage comes in legitimately. As Lord Stowell used to say of dining, 'it lubricates business.' So with companies (very numerous now) for buying

a private business. The proprietor of a good business will not risk the operation of selling to a company unless he is satisfied that the shares will be taken up. If they are not, the business is returned on his hands seriously depreciated. He insists, and naturally, that the success of the company shall be guaranteed against the caprice of the public. And the only way of doing so is by underwriting the company or paying brokerage. Of course, brokerage may be so large as to be improper. Then it will be disallowed as unreasonable, and therefore ultra vires. Directors' good sense must be trusted not to overstep the line; it may safely be trusted when quickened by the knowledge that for overpaid brokerage they are personally liable as a misapplication of the company's funds. It is not probable that *Re Faure Electric Co.* will create a panic among promoters. The vendor will only in future have to pay the brokerage, and add it on to the purchase money. As Lord Bramwell recently said of promoters, 'If you stop one hole they knock another.'

Sect. 15 of the Wills Act, avoiding gifts to attesting witnesses, is based on a sound policy, but it often tells hardly on unsophisticated persons. A solicitor, however, might have been warned by the decision *Re Barber* (31 Ch. D. 665) three years ago as to the effect of his attesting a will authorising him to charge profit costs. It is not safe to rely on the fallibility of judges of first instance (*Re Pooley*, 40 Ch. Div. 1). The section, as a penal one, is to be construed strictly, and strictly an authority to charge profit costs cannot be called 'a gift.' If the solicitor-trustee were obliged to do the work it would be a gift, but he is not, he may employ another solicitor. The authority to charge only removes the trustee-solicitor's disability to contract with his cestuique trust. That being gone the profit costs are for work and labour done just as much as if the will had authorised the trustee to buy the estate. All the same, though not a gift, the authority is a 'beneficial interest.' The solicitor gets under it what he otherwise could not have got.

Re Valdez's Trusts (40 Ch. D. 159) was a curious testamentary puzzle. Residuary bequest by *A* to *B* and *C*, and in case of their death to the executors of each of them. *B* bequeaths the residue of her property to the testator and predeceases him. *B*'s executor takes a moiety of *A*'s residue on the trusts of *B*'s will, but does the moiety pass under *A*'s will and so on round and round till *C* gets all, or is it undisposed-of estate of *A*? The latter was Kay J.'s view; but if the legacy did not go round, why should *B*'s bequest not have lapsed? At the date when *B*'s executor was to hand it over to *A*, *A* was not living.

To the lay mind music and dancing overhead three times a week, not to speak of flirting on the stairs, might appear a decided breach of a landlord's covenant for quiet possession, especially if the tenant was a studious accountant (*Jenkins* v. *Jackson*, 40 Ch. D. 71); but it has long been settled that the covenant is in the nature of a covenant for title and does not cover noise or other nuisances. It would be too much to require a landlord to guarantee the good behaviour of all his tenants. If the acts amount to a legal nuisance the tenant has his remedy against the wrong-doer, be he landlord or not. If they do not amount to a legal nuisance he has only himself to blame, for he might have got a restrictive covenant as to the user of the adjoining premises. The Court of Appeal has held on the other hand (*Tod-Heatly* v. *Benham*, 40 Ch. Div. 80) that a lessee's covenant not

to cause or permit on the demised premises anything 'which shall or may be or grow to the annoyance, nuisance, grievance or damage' of the lessor or the neighbours is not to be narrowed to less than the plain ordinary meaning of the words. Even if 'nuisance' alone would mean only something which would be an actionable nuisance without a covenant (and the Court did not favour this view), the words 'annoyance' and 'grievance' must have some meaning given to them. The decision is an example, in a somewhat new direction, of the modern leaning against artificial construction, and in favour of holding men bound by the words they have used, according to their plain meaning and the whole of that meaning.

The fusion of law and politeness, which *Field* v. *Field* (14 P. Div. 26) seems to inaugurate, will be a greater triumph even than the fusion of law and equity. Under the Divorce Rules a wife cannot petition for cohabitation or restitution of conjugal rights, unless she has first made a 'written demand' upon the husband. This sounds very businesslike, but it seems it will not do for her to send a formal letter; it must be a letter couched in a conciliatory or coaxing tone, though her solicitor may write it. By Art. 151 of the Code Napoleon 'enfants de famille,' even after full majority, must before contracting a marriage demand 'par un acte respectueux et formel le conseil de leur père et de leur mère'; but we presume that this 'acte' has long since been reduced to a common form. The case opens a new and interesting vista. We shall doubtless have a defendant applying to set aside a writ of summons as indorsed in too peremptory and impolite terms. Manners will make the lawyer. It is to be hoped that somebody will publish a Solicitor's Polite Letter Writer.

A good deal of nebulousness exists, to judge by recent cases, as to the position and powers of a receiver. A receiver's function is as an officer of the Court to preserve property pending disputes, to preserve, not to administer like a liquidator or trustee in bankruptcy. He may prove a debt against a bankrupt's estate (*Armstrong* v. *A.*, 12 Eq. 614), but if money ordered to be paid to him is not paid he cannot ex officio serve a bankruptcy notice or commence an action (*Re Sacker*, 22 Q. B. Div. 179). He must go to the Court for leave, as he must to let the estate or lay out money. It is common to speak of the appointment of a receiver at the instance of a creditor as equitable execution. This is not quite accurate. The receiver in such a case holds the property received at the hand of the Court, not on behalf of the creditor, but for the benefit of such person as shall appear to be entitled, so that a creditor who has got a receiver of his debtor's goods before the debtor's bankruptcy is not secured within s. 9 (2) of the Bankruptcy Act (*Re Dickinson, ex parte Charrington*, 22 Q. B. Div. 187). Moreover equitable execution is an auxiliary remedy, and is not to be resorted to where the ordinary remedy by *fi. fa.* or attachment of debts is available (*Manchester Banking Company* v. *Parkinson*, 22 Q. B. Div. 173). As an officer of the Court a receiver is accountable only to the Court. He is not in a fiduciary relation to the persons interested in the property: *Re Irish, Irish* v. *Irish* (40 Ch. D. 49) is an illustration. There the Court in discharging a receiver-manager of a business refused to restrain him from soliciting customers of the business which he had been managing.

Changes in the religious education of children are not desirable, especially at an age when convictions have been formed. They end too often in com-

plete scepticism, as in Gibbon's case. Had Stirling J. decided *Re Scanlan* (40 Ch. D. 200) differently, there would in almost every case where parents professed different faiths have been a reversal of the father's religious teaching on his death by the widow as statutory guardian under the Guardianship of Infants Act, 1886. The wishes of the father must be sacred even after his death.

An infant ward of Court who marries without leave may be imprisoned for contempt, but cannot be compelled to execute a settlement. The prevailing idea to the contrary is now fairly exploded (*Buckmaster* v. *Buckmaster*, 35 Ch. Div. 21; S. C. *sub. nom. Seaton* v. *Seaton*, 13 App. Cas. 61; *Re Leigh, Leigh* v. *Leigh*, 40 Ch. Div. 290). If the infant ward is a lady she suffers vicariously by the imprisonment of the bridegroom till such time as he consents to resign all benefit of her property by settling it upon her. If the infant ward is a gentleman his property does not need to be protected by imprisoning the bride. He may, if he likes, make a settlement, but he is not compellable to do so. If he has been ordered to make it he may have it set aside.

Setting aside a sale for unfairness is at all times a delicate exercise of jurisdiction. In *Fry* v. *Lane* (40 Ch. D. 312) Kay J. sums up the result of the authorities thus: 'Where a purchase is made from a poor and ignorant man at a considerable undervalue the vendor having no independent advice, a Court of Equity will set aside the transaction. This will be done even in the case of property in possession and *a fortiori* if the interest be reversionary. The circumstances of poverty and ignorance of the vendor and absence of independent advice throw on the purchaser the onus of proving in Lord Selborne's words that the purchase was 'fair, just, and reasonable.' In *Fry* v. *Lane* all these elements were present—gross undervalue, poverty, and ignorance, and there was no real independent advice, for the solicitor seems to have acted in the interests of the purchaser. But *quaere* as to the 'a fortiori' since 31 Vict. c. 4.

A less successful attempt to set aside a sale was made in *Farrar* v. *Farrars* (37 W. R. 196). There a mortgagee had sold to a company which he had got up to buy the property, and in which he was a large shareholder. The Court of Appeal, however, found bona fides and upheld the transaction. Such a sale is not a sale by the mortgagee to himself, so as to come within *Downes* v. *Grazebrook* (3 Mer. 200), *Robertson* v. *Norris* (1 Giff. 421; 4 Jur. N. S. 443), and that class of authorities. A company is an entity distinct from its shareholders.

The elementary equity that a mortgagee on payment must restore the estate was curiously illustrated in *Kinnaird* v. *Trollope* (57 L. J. Ch. 905). The mortgagor there sold his equity of redemption. The buyer further charged it in favour of the mortgagee and became bankrupt. Whereupon the mortgagee sued the original mortgagor on his covenant, and the mortgagor claimed, on paying the amount, to have the estate reconveyed to him in priority to the second mortgage, a claim which Stirling J. upheld. The right cannot be called a right to redeem, wide as that right is (*Tarn* v. *Turner*, 39 Ch. Div. 456). It could not be actively asserted. It rests upon an implied fundamental condition in the mortgage contract, as does also the rule by which a mortgagee who has foreclosed by suing the mortgagor on the personal covenant reopens the foreclosure.

In this connection, *Rosenberg* v. *Northumberland Building Society* (22 Q. B.

Div. 373), following *Wilson* v. *Miles Platting Building Society* (22 Q. B. Div. 381 n), is noticeable, as showing that the right to redeem in building society mortgages may be modified, not only by the rules in force at the date of the mortgage contract, but also by any rules which the society may make from time to time.

The priorities of incumbrancers are at all times among the most solemn mysteries of the Chancery Division. It is only with a very faint hope of ultimate extrication from this tangled labyrinth that we read that an equitable mortgagee who neglects to obtain the title deeds within a reasonable time will be postponed to a subsequent equitable mortgagee without notice who has obtained possession of them (*Farrand* v. *Yorkshire Banking Co.*, 40 Ch. D. 182).

North J., in *Pollard* v. *Photographic Company*, 40 Ch. D. 345, has decided that there is an implied term in the contract between a private sitter and a photographer that the photographer will not sell or publicly exhibit prints from the negative without the sitter's consent. This appears to be no more than good sense and good faith require, having regard to the nature of the transaction; though many sitters may not in fact object to such sale or exhibition, or may even be flattered by it.

The wrongs of married women under the old law have been paraded enough, but very little sympathy has been accorded to the husband who has to provide the costs of a divorce suit against him by his wife and pay for unfounded allegations, even go to prison if he fails when ordered to give security (*Bates* v. *B.*, 14 P. Div. 7). Justice clearly requires that, if a wife has separate property, she should be treated in the matter of costs as an ordinary litigant, and in a good many recent cases she has accordingly been ordered to pay the costs of improper proceedings out of her separate property. Sir James Hannen has lately carried this principle to the extent of ordering a guilty wife to pay her husband's costs of a divorce out of her separate property subject to a restraint on anticipation (*Hyde* v. *Hyde*, 59 L. T. R. 523). The learned judge relied on *Milne* v. *Milne* (2 P. & D. 202), but this decision of Lord Penzance was before *Re Glanvill, Ellis* v. *Johnson* (31 Ch. Div. 532), in which the Court of Appeal affirmed so strongly the inviolability of the restraint on anticipation. The decision may, however, be supported on a different ground. On dissolution of marriage or a judicial separation the wife becomes a *feme sole* in respect of property: the coverture ceasing, the restraint on anticipation ceases also. Lord Bramwell once remarked that a great lawyer may be right by instinct, though he may not assign the right reasons.

Brown v. *Burdett* (40 Ch. Div. 244) might well have stood in 'Bleak House' for *Jarndyce* v. *Jarndyce*. A more scandalous or more shocking instance of an estate wasted in costs and delay could not be found in all the disastrous record of Chancery. Happily the new procedure enables judges to deal with such abuses, and to deal with them, as *Brown* v. *Burdett* shews, with exemplary severity. If Kay J. had thought fit to have disallowed all costs whatever, the Court of Appeal would evidently not have disapproved. The only comfort the appellant got was to be told that the Court below had given him more than justice.

The statute 'de Catallis Felonum' is ranked with the 'statutes of uncertain date,' 1 St. of Realm, 230. It seems probable, however, that the statute

belongs to the first half of the reign of Henry III. At all events it was known to Bracton, who gives it in his treatise, f. 136 b, in almost the same form in which it appears in the Statutes of the Realm.

St. of Realm.

Rex Vicecomiti et omnibus aliis fidelibus suis salutem. Sciatis quod provisum est in curia nostra coram justiciariis nostris quod de cetero nullus captus pro morte hominis vel pro alia felonia pro qua debeat imprisonari, disseisietur de terris et tenementis vel catallis, quousque fuerit convictus de felonia de qua notatus fuerit . . .

Bracton.

Rex vicecomiti salutem. Scias quod provisum est in curia nostra coram nobis quod nullus homo captus pro morte hominis vel pro alia felonia pro qua debeat imprisonari, disseysietur de terris, tenementis, vel catallis suis, quousque convictus fuerit de felonia de qua notatus est . . .

The similarity between the two statutes is maintained to the end. Those who have read Mr. Maitland's highly interesting essay on 'Seisin of Chattels' in the first volume of this Review will not be surprised at the mention in this statute of disseisin of chattels. A similar instance occurs in 1 Rot. Cur. Reg. 451.

The Istituto di Diritto Romano contemplates publishing, with a Latin version, the text of the Tipucitus, from the MS. in the Vatican. The Tipucitus is an epitome of the Basilica, and has been utilised to a large extent by the editors of that famous compilation, particularly in those books of it for which there is no longer extant any manuscript authority. It is described by Mortreuil in the third volume of his Histoire du droit Byzantin (p. 252), and by Heimbach in vol. ii, p. vii of his edition of the Basilica. As the preparation of the book, which would probably fill 3 vol. 8vo., must be somewhat costly, the Institute naturally desires to discover what prospects there are of a market for it. Those willing to subscribe for a copy would do well to intimate the fact to Prof. Vittorio Scialoja, of the University of Rome, Secretary of the Institute.

The draft of a Civil Code for the German Empire, which has now been published for some time, is a subject of much interest and discussion among Continental jurists. Considerable difference of opinion has already been manifested, as might have been expected. In France legal science has happily escaped the plague of Chauvinism, and the new German Code is fully treated of in two papers read before the Société de législation comparée (Bulletin, Feb. 1889) by M. Bufnoir and M. R. Saleilles, which may be recommended to students of comparative legislation, especially those who find French easier reading than German. This is a better kind of rivalry than the practical comparison of the systems of Bange and Krupp, which politicians appear to regard as only postponed from season to season, but which all men of sense, knowing how much poorer the world would be by any serious weakening of either France or Germany, must wish to see postponed altogether.

We are glad to know that the practice of Moots has been introduced in the Law School of the University of Cambridge with every promise of good results. The following imaginary Crown Case reserved was lately argued, Professor Maitland presiding:—

'John Styles was indicted before me at the last Assizes for larceny of a portmanteau, the goods of William Nokes. The facts proved were these:—

William Nokes was keeper of the White Hart Hotel, at Blankborough. On the 5th June Styles arrived at the hotel, bringing with him the portmanteau. He engaged a bedroom, ordered dinner, which was supplied, and occupied the bedroom during the night. On the next morning he told the landlord that his portmanteau wanted a new lock, and he asked at what shop he could obtain one. The landlord told him of a shop. The prisoner called a cab, fetched his portmanteau from the bedroom, and placed it in the cab, and then (the landlord being out of hearing) told the cabman to drive to the railway station, where the prisoner took the train which was on the point of leaving for London, taking his portmanteau with him. He had not paid his bill at the inn. Upon these facts I directed the jury that if they were of opinion that the prisoner took the portmanteau from the inn with intent to avoid payment of his bill and to deprive the landlord of any right that he had to detain the portmanteau, they should find the prisoner guilty of larceny. They found him guilty. If the Court should be of opinion that this direction was right the conviction is to be affirmed, otherwise it is to be quashed.'

The point is, we believe, a novel one. We shall not disclose what judgment was given. Opinions of our learned readers are invited.

The function of Law Schools in legal education was discussed last year in a series of articles in the American Law Register (February, June, July) which have but lately come to our notice. In the July number Mr. Sydney G. Fisher of Philadelphia explains and defends 'the teaching of law by what is called the case system' as practised, now for some time, in the Law School of Harvard University. The essence of the system is to substitute the study and discussion of the actual authorities of the law for the taking of results from text-books or lecture-notes. 'The object of the case system is to compel the mind to work out the principles from the cases. The instruction is almost entirely by problems and actual or supposed cases, beginning with the simplest and rising to the difficult and complicated, mingled, of course, with explanations by the professor.' Not many English lawyers have seen a Harvard class at work. Those who have will agree, we think, with Mr. Fisher that the system is a thoroughly sound and practical one. It has been to some extent adopted in other American law schools, and approximations to the method have been tried in this country in the Inns of Court and at Cambridge, with very good effect so far as a judgment can yet be formed. One of the first and greatest fallacies besetting law students is to suppose that law can be learnt by reading *about* the authorities. Prof. Langdell's method (for it should justly bear the name of its inventor) strikes at the root of this.

We are always thankful for correct criticism, and we thank a writer in the *Law Journal* (March 2) for pointing out that Livy wrote 'aliarum super alias acervatarum legum cumulo' not 'coacervatarum.' At the same time *coacervatus* is a perfectly classical word, and, we conceive, would have been blameless in this passage if Livy had thought fit to use it. A weightier matter is this: in our note on *Lavery* v. *Pursell* we did not mean to suggest that the Law Journal Reports are habitually or in the report of this case less accurate than the Law Reports; and we called the Law Reports authorized only in the same sense in which the various series of reports which held a like position before 1865 were commonly said to be authorized; see for example Lord Justice Lindley's article in this REVIEW, vol. i. p. 138,

where the term is both used and explained. Finally, we think it well to mention that this REVIEW is neither edited nor published in Oxford. It is edited in Lincoln's Inn and published in Chancery Lane.

Mention has been once or twice made in this REVIEW of the freedom with which text-books, even by living writers, are cited in some jurisdictions in the United States, and it has been suggested that the sharp distinction which we maintain here between judicial decisions and private or extra-judicial opinions tends to be disregarded in America. We are able to state on the best authority that in Massachusetts at any rate the judicial theory is exactly the same as in England. Counsel may adopt some passage of a text-book as part of his argument, and that passage may be accepted by the Court, and, if expressly accepted, become part of an authoritative judgment. So it may here. There are one or two English judges, however, who object to text-books being specifically referred to at all in argument. We do not know whether any American Courts go so far.

A 'Maine Club' has been founded in Tokio, Japan. Its principal objects, we are informed, are to make a careful study of Sir Henry Maine's theories; to investigate the primitive societies of Japan and their development both legally and historically, and ultimately to systematize the whole scope of Japanese law on a method similar to Maine's own. Hitherto, investigations of this nature have been either in the hands of Chinese scholars, trained only in the old legal system introduced from China, or in those of young men trained in European jurisprudence, who translate and adopt modern European laws without regard to the national institutions and character of Japan.

CONTENTS OF EXCHANGES.

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The principal contents of these numbers are commentaries and discussions upon the Chilian Codes, or projected additions to them, Notes, Biographical Notices, etc.

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